C. HUNTER SALAMONE
Current Address: 2216 Church Street #30, Oxford, MS 38655
Permanent Address: 102 Riveroaks Drive, Fairhope, AL 36532
CELL: 251-229-1402 OFFICE: 662-380-5591
CharlesSalamone1@gmail.com

Jackson's gout did not flare up prior to or after landing in Atlanta, nor did she elect to pack her medication that was specially prescribed for the very illnesses in question in her carry-on luggage. HCA will claim that she knew of her condition prior to boarding and that she was contributorily negligent for the symptoms she was facing because she failed to use reasonable care in packing her medication where it could be easily accessed.

Finally, HCA will support its assertion that it was following the "best practices" for commercial air transportation by presenting the Flight Standards and Information Systems manual published by the FAA. It will argue that Wanda could've been held criminally liable for her failure to follow the orders of a flight crewmember per 14 C.F.R. § 91.11. HCA will state that Wanda Jackson only became belligerent once she was not allowed to deboard when she so desired, and that she did not accept the four other opportunities to deboard the aircraft when they were presented to her. It will contend that it cannot allow passengers to pick and choose when they exit the aircraft due to the airline's duty to keep passengers safe. It will ultimately probably conclude its argument by stating that HCA was acting in the same manner that any commercial airline would have done given the circumstances and thus, Ms. Jackson's detention was not unreasonable or unlawful.

Wanda Jackson's rebuttal will likely consist of her admitting to the fact that she declined four prior opportunities to deboard the airplane. However, Ms. Jackson will likely contend that her gout did not flare up until after the offers were made and that she does not claim to have had an exigent circumstance until that point. She will probably attempt to mitigate the damage from the decisions in *Ray* and *Abourezk* by arguing that, while persuasive, the decisions are not binding on the Supreme Court of Tishomingo. Furthermore, Wanda will likely defend her

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behavior by stating that, while it pained her to do so, she had to remain on her feet in order to get the medication that she was prescribed.

Finally, in rebuttal to HCA's allegations of Ms. Jackson breaking federal law, Ms. Jackson will likely contend that she was a woman who was in "excruciating," "burning," and "boiling" pain. She will argue that, given the circumstances, she cannot reasonably be expected to remain seated when she is enduring such a hardship. She will likely contend that letting an elderly passenger suffer while aboard the aircraft is not in the best practices of commercial aviation transportation and is not a standard industry practice. Ms. Jackson will conclude by stating that HCA chose to unlawfully involuntarily detain Wanda Jackson against her will and that she is entitled to damages as a result of the unlawful behavior of HCA.

In summary, Wanda Jackson was not unlawfully detained because the totality of the circumstances do not merit an unreasonable detention in "nature, purpose, extent and duration" under the decision in *Wallace*. Furthermore, Wanda's complaints of gout and claustrophobia do not rise to the level of an exigent circumstance under *Abourezk* with the decision in *Ray*, as the illnesses in question did not create a mandatory duty to release for HCA. Moreover, Wanda was clearly in violation of 14 C.F.R § 91.11 due to her actions of interfering with a member of a flight crew. Finally, the airline was simply following the "good practices" set forth by the FAA. Thus, Wanda Jackson's detention in this case does not rise to the level of unlawfulness.

(END OF SAMPLE)

Applicant Details

First Name	**Nicholas**
Last Name	**Santos**
Citizenship Status	**U. S. Citizen**
Email Address	**santos.109@osu.edu**
Address	**Address** Street **1620 North High Street** City **Columbus** State/Territory **Ohio** Zip **43201** Country **United States**
Contact Phone Number	**5712774992**

Applicant Education

BA/BS From	**Capital University**
Date of BA/BS	**May 2018**
JD/LLB From	**The Ohio State University Moritz College of Law**
Date of JD/LLB	**May 14, 2021**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Ohio State Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Roser-Jones, Courtlyn
roser-jones.1@osu.edu
Greenbaum, Arthur
greenbaum.1@osu.edu
614-292-4160
Coats, Holly
hollycoats.20@gmail.com
3046153202

References

Judge Michael H. Watson (614) 719-3280

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nicholas Santos
1620 North High Street, Apt. 502 Columbus, Ohio 43201• 571-277-4992 • santos.109@osu.edu

September 3rd, 2020

Judge Elizabeth W. Hanes,
United States District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am a rising 3L at the Ohio State University Moritz College of Law applying to be a term-law clerk in your chambers for the 2021-2022 term. As a highly motivated self-starter and a strong legal writer with a desire to return to Virginia, I am a great fit for this position.

Clerking presents the unique prospect of working closely with a tightly knit and experienced group of lawyers and gaining valuable insights into the mind of a judge. When I externed for Judge Watson, I was impressed with how collegial and supportive his clerks were. It brought me back to my days as a collegiate athlete, where I developed a strong commitment to teamwork, communication, and time management. I have remained committed to these ideals in law school. As the Source Editor for the Ohio State Law Journal I am constantly coordinating my efforts with the librarians and other executive members of the journal. My skills will lend well to your chambers' collaborative environment.

My well-rounded academic background demonstrates my critical thinking skills and versatility. As an undergraduate I excelled in a plethora of courses ranging from macroeconomic theory to abstract algebra. This exposure to a diverse curriculum sharpened my organizational and analytical skills, which has helped me earn high marks in both my writing and doctrinal courses. As my third-year approaches, I grow more excited to practically employ the classroom knowledge and skills that I have gained. I am enrolled in a civil law clinic this coming spring and am looking forward to gaining practical litigation skills as I represent clients in pending civil cases.

My professional experience will lend itself well to your chambers. I was able to balance part time employment at a worker's compensation defense firm while maintaining a high grade point average. Additionally, my experiences as an extern to Judge Michael Watson and as a Research Assistant to Professors, Greenbaum, Glogower, and Roser-Jones have further developed my legal research and writing skills. At the 1851 Center for Constitutional Law, I learned how to prepare for constitutional litigation and conduct client outreach. I spoke with gym owners, private school administrators, and restaurateurs who had fallen on hard times during the early stages of the COVID 19 pandemic. It was rewarding to know that I was making a difference in the lives of everyday Ohioans. I would like to similarly serve the people of Virginia as a law clerk in your chambers.

I understand that clerking for a judge is demanding, and I have the work ethic and discipline that will help me to overcome any challenge presented. I have balanced a demanding schedule since my days as an undergraduate student athlete. The self-discipline that I have fostered live on, as to this day I get up at 5:00 AM to go to my CrossFit class before taking on my responsibilities.

Living in Ohio for the past six years has been wonderful, but as an Annandale native I miss the state in which I was raised. I would very much like to return and clerk for your chambers. Enclosed please find copies of my resume, law and undergraduate transcripts, writing sample, as well as letters of

recommendation. I welcome the opportunity to interview with you to further discuss my qualifications. Thank you for your consideration of my application.

Sincerely,

Nicholas Santos

Nicholas Santos

1620 North High Street, Apt. 502 Columbus, Ohio 43201• 571-277-4992 • santos.109@osu.edu

EDUCATION

The Ohio State University Moritz College of Law, Columbus, Ohio
Juris Doctor expected, May 2021
GPA: 3.63; Numerical Average: 91.2; Class Rank: Top 35% (Top 25% is 91.3)

- *Ohio State Law Journal*: Source Editor, Staff Editor
- Barbri Student Representative
- 1L Moot Court Competition
- Federalist Society

Capital University, Columbus, Ohio
Bachelor of Arts, Honors Program, *magna cum laude*, May 2018
Double Major: Mathematics, Economics/Political Science (Hybrid), GPA: 3.82

- Math Seminar/Honors Capstone: *The Mathematics of Juggling and the "Ménage Problem"*
- Ohio Athletic Conference: Academic All-Conference (All years)
- Men's Track and Field team (2016-2018), Baseball team (2014-2016)

LEGAL EXPERIENCE

The 1851 Center for Constitutional Law, Columbus Ohio,
Law Clerk, May 2020- Present

- Responsibilities include: Client outreach and legal research on constitutional issues concerning property rights, local government taxation, and licensing fees

The Ohio State University Moritz College of Law, Columbus, Ohio
Research Assistant to Professor Courtlyn Roser-Jones, May 2020 – Present

- Responsibilities include: Conducting research on unionization and employment practices in the video game industry, interviewing game developers, and reviewing academic literature concerning game development and the sociological impact of its business structure

The Ohio State University Moritz College of Law, Columbus, Ohio
Research Assistant to Professor Ari Glogower, May 2020 – Present

- Responsibilities include: Researching legal realism and the law-and-economics movement, and creating citations and parentheticals for Professor Glogower's forthcoming publication "Taxation and the Law and Political Economy Framework"

Thomas & Company, LPA, Delaware, Ohio
Part-time law clerk, October 2019 – December 2019 (**Summer program cancelled due to COVID-19*)

- Assisted in the advising of clients on matters concerning worker's compensation
- Drafted preliminary reports on injured workers and potential compensation result
- Conducted research on novel appellate claims such as cancerous diesel exhaust fumes

United States District Court for the Southern District of Ohio, Columbus, Ohio
Judicial Extern to Judge Michael Watson, May 2019 – July 2019

- Drafted bench memorandum concerning abandonment and exceptions to the Fourth Amendment's warrant requirement and presented research to Judge Watson to help prepare for Ninth Circuit sitting
- Analyzed presentencing investigation reports and sentencing memoranda
- Observed sentencings, hearings, and a jury trial

The Ohio State University Moritz College of Law, Columbus, Ohio
Research Assistant to Professor Arthur Greenbaum, May 2019 – August 2019

- Researched and draft memoranda on topics related to FRCP 26 including the effects of the 2010 amendments on communications between expert and counsel, and the ethical implications of attorneys assisting with expert report drafting and ghost writing for pro se litigants

INTERESTS & ACTIVITIES

- CrossFit Grandview, Moritz Intramural Softball, Washington Nationals fan, Mises Institute, Golf

Nicholas Santos
The Ohio State University Moritz College of Law
Cumulative GPA: 3.635

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civl Procedure 1	Art Greenbaum	91	4	
Criminal Law	Joshua Dressler	82	4	
Dueling Systems of Law	Jon Quigley	S	1	Satisfactory/Unsatisfactory grading
Legal Analysis and Writing 1	Paul Gatz	82	2	
Torts	Ruth Colker	92	4	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Mohamed Helal	96	4	
Legal Analysis and Writing 2	Holly Coats	97	3	Recommendation letter
Legislation and Regulation	Christopher Walker	92	3	statutory interpretation and chevron
Property	Amy Cohen	91	4	

Summer 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Judicial Externship	Judge Michael H. Watson	S	2	Satisfactory/Unsatisfactory grading

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Advocacy	Colleen Settineri	93	2	Appellate Brief Writing and Oral Argument
Cannabiz	Benton Bodamer	94	2	Seminar focusing on the cannabis industry, the legality of cannabis businesses, and the legal market that has grown around cannabis
Civil Procedure 2	Art Greenbaum	91	3	
Constitutional Law	Edward Foley	92	4	
Contracts 2	Guy Rub	90	3	
Ohio State Law Journal	N/A	S	1	

Spring 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Employment Law	Courtlyn Roser-Jones	S	4	S/U grading
Evidence	Monte Smith	S	4	S/U grading

Federal Income Taxation	Ari Glogower	S	4	S/U grading
Ohio State Law Journal	N/A	S	2	S/U grading
Wills Trusts and Estates	Beatrice Wolper	S	3	S/U grading

Nicholas Santos
Capital University
Cumulative GPA: 3.828

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Early American Law	David N. Mayer	A-	3	
Elementary Statistics	Leigh Johnson	A	3	
Intermediate Microeconomic Theory & Practical Application	Roxanna Postolache	A	4	
Intro to PoliSci	Suzanne Marilley	A	3	
PoliSci Professional Development Seminar	Suzanne Marilley	A	1	
Science & Technology in Society	N/A	A	3	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Calculus 2	Jon D. Stadler	B	4	
Global Awareness	Michael Yosha	A	3	
Oral Communication	Jim Higgins	A-	3	
PoliSci Professional Development Seminar 2	Suzanne Marilley	A-	1	
intermediate Macroeconomic Theory & Money	Stephen Baker	A	4	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Cultural Pluralism in American Society	N/A	A	3	
Evolution of Economic Systems of Thought	Stephen Baker	A	4	
General Physics 1	Pat Shields	B+	4	
Power & Justice	Sean Walsh	A	3	
Religious Foundations & The Bible (Honors)	E. Wray Bryant	A	3	Honors accelerated course

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Environmental Economics	Roxanna Postolache	A	4	
Humanities: Classical, Medieval, Renaissance (Honors)	David Summers	A	3	One of my favorite classes. Professor Summers was incredible.

Introduction to Mathematical Proofs	Jon D. Stadler	B	4	
Modern American Law	Suzanne Marilley	A	3	
Visual Art	N/A	A	3	

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Elementary Spanish 1	Maria Delgado	A	4	
International Relations	Sean Walsh	A	3	
Intro to Computer Science (Python Programming)	David Reed	A	3	
Introductory Combinatorics	Jon D. Stadler	B+	3	formed base of knowledge needed for capstone project
Math Seminar	Jon D. Stadler	A	1	
Mathematical Statistics	Leigh Johnson	A-	3	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Abstract Algebra	Jon D. Stadler	B+	3	
Calculus 3	Jon D. Stadler	A-	4	
General Physics 2	Pat Shields	A	4	
Math Seminar	Jon D. Stadler	B+	1	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Comparitive Politics	N/A	A	3	
Honors Capstone	Stephanie Gray Wilson	Pass	2	P/F
Linear Algebra	Jon D. Stadler	A	3	
Math Seminar	Jon D. Stadler	A	1	
Philosophy & Politics	Sean Walsh	A	3	
Topics in Abstract Algebra	Jon D. Stadler	A	1	Small class that expanded upon concepts learned in previous Abstract Algebra course

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Differential Equations & Dynamic Systems	Paula Federico	B+	3	
Ethical Issues & Religious Conversations	Hiltbrunner	A	3	
History of Mathematics	N/A	A	3	
Honors Capstone	Stephanie Gray Wilson	Pass	2	P/F
Vinyasa Yoga	N/A	A	1	

Summer 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Washington Center/ Public Admin. Internshiop	Sean Walsh	A	12	

September 02, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to recommend Nicholas (Nick) Santos for a clerkship position in your chambers. Nick is terrific—easily my best Research Assistant, and one of the best students I've taught. His painstaking attention to detail and independent curiosity will make him an excellent law clerk.

As a student in my Employment Law course this past spring, Nick consistently impressed me with his thoughtfulness and professional demeanor. Some days, I actually wondered if he had overprepared, a thought I assure you is very rare. As the semester continued, Nick reserved many of his five-star questions for our discussions outside of class—contextualizing the forest over the trees and understanding his grasp of the information to be beyond that of his peers. Seeing him at my office door, or the back of the post-lecture student queue invoked a delightful sense of excitement (and a little nervous apprehension) in me. While impossible to predict what he might ask or say, Nick always made me think. Likewise, our discussions were a wonderful assessment of my own conveyance of information on a given day, because if Nick didn't get it, no one did. That Nick is independently curious about details, while also focused on the big picture, makes him well-suited for a clerkship position. He is going to produce a constant stream of quality work and also contribute significantly to the creative discussion.

Indeed, my scholarship has been the beneficiary of Nick's quality work product as well. I should stress that I hired Nick as a Research Assistant after filling all of my open summer positions. But, when the chance to work with him surfaced after his previous engagement fell through for COVID-related reasons, I couldn't help myself. He impressed me so much as a student that I mortgaged future funding and positions to take him on. And I don't regret it. I've never had a Research Assistant summarize materials as quickly and comprehensively as he does. He takes initiative, communicates with me often, and is receptive to feedback.

I genuinely hope you consider Nick for a clerkship position in your chambers. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely yours,

Courtlyn G. Roser-Jones
Assistant Professor of Law
roser-jones.1@osu.edu
(614) 514-5915 (office direct)
(814) 404-0074 (cell)

September 02, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Nicholas Santos, a rising third-year student at The Ohio State University Moritz College of Law, has asked that I write in support of his clerkship application. I am very pleased to do so.

I met Nick his first semester of law school when he was enrolled in my Civil Procedure I class. On the strength of his overall performance in that class, I hired him to work part-time as my research assistant over the summer. I also had Nick as a student during his second year as a student in my Civil Procedure II class. Based on these experiences, and numerous conversations outside of class, I am happy to recommend him to you.

As you can tell from his resume, Nick is a very strong student. His first semester was uneven as he made the adjustment to law school, but his second semester was terrific, earning all As. He repeated that performance during this third semester. In my course his first semester he was active in class and at office hours. In the end he received a well-deserved A, as he did again in Civil Procedure II. His performance as my research assistant was that of a solid A student.

Among Nick's strengths are his communication skills. His writing skills are top notch. After a very slow beginning in LAW I, he turned things around and received a high A in LAW II. and an A again in appellate advocacy. He employed those skills to secure a spot on our top law journal through his performance in a highly competitive writing competition. Nick is also very likeable, with an easy manner, which makes him a good conversationalist whether it be about baseball or the intricacies of the law.

Nick did an excellent job working as my research assistant. Because of his work with Judge Watson that summer, he was only available to work for me ten hours a week, but he made the most of that time. Much of Nick's work involved research concerning the interpretation of several Federal Rules of Civil Procedure pertaining to discovery. We don't teach much about discovery in our first-year course; that is a principle focus of our upper-level civil-procedure offerings, so he faced each project without having a background in the area. I was impressed that Nick was able to quickly acclimate himself to the basics of each question he explored and then was able to provide the research support I needed in a timely fashion.

Nick has now worked as a research assistant for three law professors. I think that speaks to the universal regard in which he is held by his professors.

In short, I think you will find Nick to be bright, well-spoken, diligent, and professional in his approach to work. I encourage you to give him every consideration.

Sincerely,

Arthur F. Greenbaum
James W. Shocknessy Professor of Law

Arthur Greenbaum - greenbaum.1@osu.edu - 614-292-4160

September 17, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is my pleasure to recommend Nicholas Santos for a judicial clerkship in your chambers. I have known Nick since January of 2019, when he was a student in my Legal Analysis and Writing II (LAW II) class during my time as a visiting professor at The Ohio State University Moritz College of Law. LAW II sections are small—20 students or less—so professors have an opportunity to interact and engage with the students. Nick is a student I worked with closely, and one that I hold in high regard. Speaking as a former and current law clerk, I firmly believe that Nick would be a strong and effective clerk.

From the beginning of the semester in LAW II, Nick distinguished himself from his fellow 1Ls as a student who was especially active and engaged in his own learning. Early on he became an integral part of our classroom community, helping to keep our sessions moving forward with thoughtful questions and comments. During small group activities, Nick was a consistently enthusiastic and collaborative team member. Overall, Nick's contributions to the class demonstrated a deep intellectual curiosity, as well as a willingness to take intellectual risks—both essential to effective learning. His example helped to create a classroom environment where other students were more engaged and eager to learn, and less afraid to be "wrong." Nick also became a frequent visitor during office hours, interested in discussing our assignments—the legal theories and policies they presented, as well as best practices for legal writing—and eager to make connections between our work and his work in other classes. I always enjoyed Nick's visits: in our conversations, he showed a great capacity to quickly synthesize and connect new concepts and nuance in the law. And, just as importantly: he was always prepared, respectful, good-natured, and a pleasure to talk to.

Many law students are highly intelligent, and Nick is no exception. But, in my time working with Nick, two things stood out to me more: his resilience and his willingness to work hard to succeed. Early in the semester, Nick shared that he was a bit discouraged after his first semester legal writing course, but that he was committed to improving. Nick certainly was not the only student to express such a sentiment to me—but he was the student who most successfully followed through on that commitment. In LAW II, students receive feedback and critique on the drafts of their writing assignments, and then get the chance to re-submit a final product. Nick embraced these opportunities for feedback, accepting the constructive criticism with professionalism, positivity, and an eagerness to improve. Nick he had the maturity to view the process as an opportunity to develop critical lawyering skills, not just as a way to get a good grade. And not only did Nick respond to feedback with a positive attitude—he also put in the time and effort to implement the feedback he received, which resulted in substantial improvements to his final submissions. Throughout the semester, I was continually impressed with Nick's determination and coachability—characteristics that indicate the kind of person he is. These characteristics are also, in my experience, essential to being an effective law clerk.

Nick's resilience and work ethic have also been on display this summer. In the wake of a global pandemic that led to his law firm eliminating his summer associate position, he refused to let the summer go to waste. Instead, with little time or notice, he found a position at a non-profit and took on two research assistant positions, to ensure that he could use the summer to continue developing his legal skills. After seeing Nick's persistence and drive to succeed on multiple occasions, I was not surprised to learn that Nick was a collegiate athlete. It is evident that Nick applies the same drive that is required to compete in high-level athletics to his life and work, and this would undoubtedly further his ability to be a successful clerk in your chambers.

Finally, Nick has also demonstrated that he is a strong writer who can perform complex research and conduct sophisticated, multi-issue analyses. The major writing assignment for LAW II was a motion for summary judgment that required students to analyze a Title VII retaliation claim. The assignment included an issue of first impression and an issue that required students to make novel statutory interpretation arguments. The task is one that would be challenging for any lawyer, let alone a first-year law student. But Nick was up to the challenge. His research was thorough and creative; each component of his document was effectively organized to maximize its persuasive effect; and his legal arguments were grounded in sound analysis of the facts and law. Ultimately, Nick's final paper received one of highest scores in the class and helped earn him one of just a handful of A's allowed to be given in LAW II. Since then, Nick has also sought out other opportunities to improve his writing, including participating in Moritz's 1L Moot Court competition and serving as a member of the Ohio State Law Journal, which requires its members to write a student note. Nick's ability to analyze complex legal issues and convey that analysis clearly will assuredly lead to strong work product as a member of your chambers team.

It is for these reasons that I offer my recommendation for Nick. His personal characteristics combined with his intelligence and legal analysis skills would make him an outstanding law clerk and a great addition to your chambers.

If you have any questions regarding this recommendation, please feel free to contact me.

Sincerely,

Holly Coats - hollycoats.20@gmail.com - 3046153202

/s Holly L. Coats

Holly L. Coats
Law Clerk to The Honorable Chief Judge Hopkins
U.S. Bankruptcy Court Southern District of Ohio
Phone: 513-684-2420
Email: Holly_Coats@ohsb.uscourts.gov

Nicholas Santos
1620 North High Street, Apt. 502 Columbus, Ohio 43201• 571-277-4992 • santos.109@osu.edu

Writing Sample Cover Page

This writing sample is an excerpt from the argument section of the open research memo I submitted for my legal research and writing course during the spring of my 1L year. The memo concerns a lawsuit filed by creative executive Lawrence Sterling against his employer Gray Advertising. Sterling alleged that he was retaliated against in violation of Title VII of the 1964 Civil Rights Act. Sterling and members of one of this creative teams made sexually charged remarks that were directed a female employee, who later filed a lawsuit against Gray for sexual harassment. During Sterling's deposition by the EEOC investigator, he revealed incriminating information about Gray's business practices. Soon after, a number of adverse actions were taken against him. This memo was submitted in opposition to Gray's motion for summary judgement.

Four issues were addressed in the argument section: 1) Whether Sterling was engaged in a protected activity within the meaning of the statute; 2) Whether Gray was aware of STelring's engagement in the protected activity; 3) Whether Sterling was subjected to a severe and hostile work environment; 4) Whether causation was satisfied. The first and third issues required the most research. The excerpt features the discussion regarding the first issue.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

LAWRENCE A. STERLING	)	**JUDGE COATS**
Plaintiff,	)	
	)	
v.	)	**CASE NO. 19-02311**
	)	
GRAY ADVERTISING WORLDWIDE,	)	
Defendant.	)	

PLAINTIFF LAWRENCE STERLING'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

Argument

A. The motion for summary judgement should be denied, because all elements of a *prima facie* case for retaliation are present.

Plaintiff Sterling has produced evidence to support a reasonable jury's conclusion that he has suffered retaliation at the hands of Gray Advertising ("Gray"). The evidence demonstrates that all four elements required to make out a prima facie case of retaliation under Title VII of the 1964 Civil Rights Act are present.

The anti-retaliation provision of Title VII reads:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees… because he has *opposed any practice made* by this subchapter, or because he has made a charge, testified, assisted, or *participated in any manner* in an investigation, proceeding, or hearing under this subchapter."

42 U.S.C §2000e-3. This provision outlines two clauses that give rise to a retaliation claim: the opposition clause and the participation clause. Mr. Sterling's claim arises out of the participation clause. The two methods for establishing a retaliation claim are the same for both clauses: the plaintiff may either introduce direct evidence or circumstantial evidence that supports an inference of retaliation. *Laster v. City of Kalamazoo,* 746 F.3d 714, 730 (6th Cir. 2014). Mr. Sterling has chosen the latter path, and as a result the burden shifting framework established by

the *McDonnell Douglas* case applies. *Id.* Under this framework, the plaintiff bears the initial burden of establishing a *prima facie* case of retaliation. *Id.*

To make out a prima facie case of Title VII retaliation, a plaintiff must prove that (1) he engaged in an activity protected by Title VII; (2) this exercise of protected rights was known by the defendant; (3) the defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to a severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or the harassment. *Morris v. Oldham Cty. Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000).

Because Plaintiff has established all four elements, the Defendant's motion for summary judgement should be denied. Gray's interference with the remedial mechanism of Title VII should not go unpunished, as disciplining Mr. Sterling for his deposition is exactly the type of conduct that Title VII's anti-retaliation provision prohibits. Granting summary judgement would allow for Gray to get away with persecuting Mr. Sterling for revealing potentially illegal business practices to an EEOC investigator. A jury should decide this case.

1. **Sterling was engaged in a protected activity because he "participated" within the meaning of the statute.**

Sterling was engaged in a protected activity. Although his conduct spurred the sexual harassment lawsuit for which he was deposed, he nonetheless participated within the plain meaning of Title VII's participation clause. The Sixth Circuit has recognized that "there can be little doubt that the filing of charges and participation by employees in EEOC proceedings are instrumental to the EEOC's fulfilling its investigatory and enforcement missions." *E.E.O.C. v. SunDance Rehab. Corp.*, 466 F.3d 490, 499 (6th Cir. 2006). Whether or not the participation clause protects a reluctant deponent is an issue of first impression for this Court.

While the Sixth Circuit and the Supreme Court have yet to decide on this issue, the Eleventh Circuit has held that a reluctant deponent, whose conduct is the underlying reason for the suit that his deposition concerns, has nonetheless "participated in any manner" in a Title VII lawsuit. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997). There are three reasons for this holding: First, the text of the retaliation provision is unambiguously straightforward and expansively written so as to encompass all those who testify regardless of motive. *Id.* at 1186. Second, there are two insurmountable problems with the purpose-driven approach that takes motive into account. *Id.* at 1186. Finally, the absurdity doctrine does not apply as this Court's implementation of the Eleventh Circuit's holding would not dissuade employers from properly disciplining their employees. *Id.* at 1188.

i. The plain text of the retaliation provision is unambiguously straightforward and expansively written so as to cover the testimony of a reluctant deponent.

The participation clause encompasses the testimony of a reluctant deponent because it contains no limiting language that would contradict its otherwise unambiguously and expansively written terms. In *Merritt*, the Eleventh Circuit invoked a fundamental canon of statutory interpretation: The presumption that a legislature says in a statue what it means and means what it says. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). When the words of a statue are unambiguous, then this first canon of statutory construction is also the last. *Id.* This Court should look no further than the plain language of the participation clause.

Merritt concerns a case remarkably similar to the one at bar. In *Merritt*, Secretary Janet Moore filed a sexual harassment lawsuit against the Dillard Paper Company (her employer), and identified five men whom she alleged subjected her to sexual harassment. *Merritt*, 120 F.3d at 1183. The five men, including Harry Merritt, were deposed by the EEOC. *Id.* During his deposition, Merritt admitted to partaking in harassing conduct, but countered by alleging that

Moore was a willing participant in the office's "bawdy atmosphere." *Id.* A settlement was reach, and soon after, Merritt's employer fired him because his deposition was "the most damning to Dillard's case." *Id.* Merritt, in turn, filed a charge with the EEOC alleging he was retaliated against for his protected deposition. *Id.* at 1184. The district court held that Title VII does not protect those who involuntarily participate in an investigation. *Id* at 1184.

The Court of Appeals for the Eleventh Circuit reversed the district court's ruling, and held that the "straightforward and expansively written" anti-retaliation provision encompasses the testimony of a reluctant deponent. *Id.* at 1186. The court focused on the text of the statute: "As the Supreme Court has admonished, 'We have stated time and time again that courts must presume that a legislature says in a statue what it means and means what it says there.'" *Id.* at 1185. The court reasoned that Congress chose its wording in order to express its intent about the activity to be protected against retaliation. *Id.* at 1186. The text of the participation clause reads: "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C §2000 e-3(a). The word "testified" is not preceded or followed by any restrictive language that limits its reach, and the adjective "any" is not ambiguous, and has a naturally expansive meaning. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (noting that, when read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."). *See also Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1005–06 (5th Cir. 1969) (discussing the exceptionally broad protection afforded by Title VII's inclusion of assistance and participation in any manner). Based on the reading of the text, Congress' intent was to protect any and all deponents.

A case raising a novel issue does not call for deviating from the plain text of the participation clause. The Fifth Circuit's analogous interpretation of the participation clause in

Pettway v. Am. Cast Iron Pipe Co. provides further support for the Eleventh Circuit's interpretation. In *Pettway,* the Fifth Circuit was also faced with an issue of first impression: whether an employee who made allegedly libelous statements in a letter to the EEOC is covered by the participation clause. *Id.* at 1003. The Fifth Circuit, in agreement with the EEOC's conclusion, held that such an employee is covered by the participation clause. *Id.* at 1005. The court reasoned that Title VII was the product of competing interests, and that based on its broad language the balance was struck in favor of the employee. *Id*. at 1007.

Like the employer in *Pettway*, Gray has alleged that Sterling made false statements during his EEOC deposition. Like the employee in *Merritt*, Sterling's conduct was the underlying cause of the sexual harassment suit for which he was deposed. The Fifth and Eleventh Circuits clearly articulate why the unambiguously broad language should not be abandoned when faced with a novel issue: carving out exceptions for cases that raise novel issues or involve seemingly unsavory characters seeking protection would render the protections afforded by Title VII to be illusory.

Adhering to the text of an unambiguous statute is a well-established tenet of statutory construction, and was appropriately utilized by both the Eleventh Circuit and the Fifth Circuit in cases analogous to the one at bar. This Court should apply the Eleventh Circuit's reasoning: the straightforward and expansively written language of the participation clause encompasses the testimony of both willing and reluctant deponents.

ii. A participant is not required to have intended to aid or assist a claimant in order to be protected by Title VII

A participant is not required to have intended to aid or assist a claimant in order for his activity to fall within the ambit of Title VII. In *Merritt,* the lower district court held that the anti-retaliation provision was designed to protect only those who intend to aid or assist Title VII

claimants. *Merritt*, 120 F.3d at 1184. The Eleventh Circuit Court rejected this purpose-driven construction of the statute for two reasons: First, this interpretation contradicts the actual design put forth by the language of the provision. *Id.* at 1186. Second, this reasoning falsely equates the objective effect of participation with the subject intent of the deponent. *Id*.

It goes against the well-established modern trend of statutory construction to defy the actual design of statutory language. The Eleventh Circuit reasoned that "Congress could have crafted the statutory provision that way. But it did not. Congress said 'testified' and 'participated in any manner', not 'voluntarily testified' and 'voluntarily participated.'" *Id*. at 1187. Deferring to the legislature to change statutory language in order to better effectuate purpose is consistent with the court's role as a faithful agent. This Court should avoid altering statutory language by reading in terms that are not there.

The second insurmountable problem with the purpose driven approach is that it falsely equates the objective effect of participation with the subjective intent of the deponent. An investigation requires all parties to testify truthfully, even if one side does not seek to aid or assist the other. The Eleventh Circuit recognized that even a reluctant deponent can objectively benefit an investigation:

> "He hated to do so, and he tried every way to avoid it, but Merritt's reluctant deposition testimony did assist Moore in her claim against Dillard. Indeed, in the words of Dillard's president, that testimony was 'the most damning to Dillard's case." *Id.* at 1187.

Similarly, in this case Green viewed Sterling's testimony as damning to Gray's case. Akin to how Merritt testified that Dillard had a "bawdy atmosphere", Sterling testified that remarks akin to the ones made to Ms. Roberts were commonplace at Gray. Sterling Dep. 4. Whether he intended it or not, his testimony did assist Ms. Roberts in her case against Gray as he provided needed information on the culture of the workplace. This Court should employ the

Eleventh Circuit's reasoning: A participant is not required to have intended to aid or assist a claimant in order for his activity to fall within the ambit of Title VII.

iii. Adherence to the plain statutory language would not produce an absurd result.

Adhering to the plain language of the participation clause would not produce an absurd result, as employers would still be able to discipline miscreant employees. Discerning the true motive behind punishment would be an issue relevant to causation.

Implementing the Eleventh Circuit's reasoning would not promote a "chilling effect" on employers, as they would still be free to discipline their employees so long as this discipline is not causally related to any protected activity. Regarding this case, nothing was stopping Gray from disciplining Sterling as soon as the company became aware of his misconduct. Gray terminated Sterling's coworkers Ward and Cooper for their harassment of Ms. Summers. Green could have disciplined Sterling before he testified, but she chose to do so after she was informed of Sterling's disclosure of Gray's research techniques. The fact that Green acted when she did calls into question just how committed Gray is to enforcing its sexual harassment policy.

Furthermore, absurd consequences would result from departing from the plain meaning of the text. The Eleventh Circuit constructs a hypothetical that illustrates this point: Suppose that an employee is guilty of sexual harassing a coworker. The employee testifies truthfully about his behavior, and as a result is fired by his employer. The employer then announces that the reason for firing the miscreant employee was because he testified truthfully. The employer mandates that employees must lie about their sexual misconduct to investigators, or be fired. *Merritt*, 120 F.3d at 1188. If this Court were to adopt the Defense's interpretation of the participation clause, an employer could fire an honest employee and face no legal repercussions.

Based on the Eleventh Circuit's reasoning, whether or not Sterling intended to assist Ms. Roberts' sexual harassment claim is immaterial. On the one hand, Sterling can be viewed as a reluctant deponent. He was in a predicament analogous to the one faced by the plaintiff in *Merritt*, as he was deposed for a sexual harassment investigation brought on because of his own actions. His lack of intent to aid Ms. Roberts' position evidences his reluctance. On the other hand, unlike the plaintiff in *Merritt* Sterling was unaware that his conduct was underlying Ms. Robert's claim at the time of his deposition.

The Eleventh Circuit's analysis highlights why a broad interpretation of the participation clause that covers both willing and reluctant deponents is most appropriate: adhering to the plain text is in line with the trend of statutory construction advocated for by the Supreme Court, reluctant deponents objectively benefit an EEOC investigation even if lacking subjective intent to aid a claimant, and absurdity would not result from this interpretation. It follows that Sterling was engaged in a protected activity.

Conclusion

Because Plaintiff Sterling has met the initial burden of proving a *prima facie* case of retaliation under Title VII, the Defendant's motion for summary judgement should be denied. All four elements of retaliation are present. First, Sterling was engaged in a protected activity because he participated within the meaning of Title VII's participation clause. This Court should adopt the holding of the Eleventh Circuit on this novel issue: the unambiguous text of the participation clause provides a wide range of protection that encompasses the testimony of deponents both willing and reluctant. Second, Gray was aware of Sterling's engagement in the protected activity as Green had actual knowledge that Sterling was participating in an EEOC interview when he made incriminating disclosures regarding the culture at Gray and Gray's

business practices. Third, Green subjected Sterling to a severe and pervasive hostile environment. The actions taken against Sterling were subjectively perceived by him to be severe and pervasive. The actions were objectively severe and pervasive because when viewed in their totality they were humiliating, frequent, and would have dissuaded a reasonable creative executive from engaging in future protected activity. Finally, causation is satisfied as the actions taken by Green were the cause-in-fact of the hostile environment. The harm to Sterling would not have occurred in the absence of his participation or Green's actions.

By punishing Sterling for his honesty during an EEOC deposition, Gray interfered with Title VII's remedial mechanism. Employees in situations similar to Sterling's deserve protection under Title VII, as every investigation requires honest disclosure and full cooperation from all parties involved. These parties, no matter their paygrade or how sympathetic they are, deserve to be insulated from pressures exerted on them by their employers. This will allow for Title VII's mechanism to properly function and will ensure that victims of harassment can be made whole. Justice can be served only by this Court denying Gray's motion for summary judgement and allowing for a jury to decide this case.

Respectfully submitted,

____Nicholas Santos_____
Attorney for Plaintiff

Applicant Details

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Applicant Education

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Date of BA/BS	**May 2017**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 1, 2022**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Federal Circuit Bar Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**GW Law**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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References

References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 12th, 2021

Hon. Judge Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am a rising 3L at The George Washington University Law School and am writing to apply for a Judicial Clerkship position with the U.S. District Court for the Eastern District of Virginia.

Much of my academic and professional experiences have been understanding the nuances of the business industry. As an undergraduate majoring in finance, I secured an internship with one of the world's leading investment banks working on investment strategy. From the outset, I was exposed to client interaction, modeling investment portfolios, and working on the business development front that led to acquiring over $30 million assets under management. Because of my exposure to the capital marketplace, I was then selected to work with a professor conducting research on the implications of monetary transmissions within emerging market economies. I spearheaded a research team to gather information and create databases that would consolidate mass amounts of information into studying patterns that included negative interest rates in Eastern Europe, shadow banking in China, and Sub-Saharan sovereign bond debt issuances. The legal field is not much different. Applying mass amounts of case law with intricate topics that are applicable to the facts is much like understanding patterns of monetary transmissions.

This past summer, I was an intern for the US Attorney's Office working on criminal enforcement and engaging in community lawyering through systematic reform. I contributed towards a reassessment of sentencing guidelines for repeat convicts and analyzed evidentiary matters for individuals facing felony charges. Subsequently, this past fall semester, the Department of Justice's (DOJ) Antitrust Division solidified my interest in litigation. I experienced working on ongoing covert investigations with international notoriety on criminal violations of the Sherman Act. Some of my work at the DOJ led to drafting a motion filed in the Southern District of New York. Furthermore, my most recent work at the Securities and Exchange Commission involved reassessing guidelines for special purpose acquisition companies to be in compliance with federal law because of the regulatory risks from government disinvolvement.

During my first year of law school, I accepted board membership for Alternative Dispute Resolution and the Mock Trial Board – extended to the top 15% of competitors. I am also a member of the *Federal Circuit Bar Journal* where I wrote my note topic on the implications of interest netting for federal income tax purposes in the Court of Federal Claims and hope to amalgamate my experiences by writing on intricate topic as a clerk. Enclosed, please find my resume and transcript for your review. I sincerely thank you for your time and consideration.

With Warm Regards,

Ali Sarwari

Ali Sarwari

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Education

The George Washington University Law School Washington, D.C.
J.D. Expected, Pursuing Concentration in Business & Finance Law
Skills Board: Mock Trial Board (Member), Alternative Dispute Resolution Board (Member)
Journal: Federal Circuit Bar Journal (Member) May 2022
Activities: 1L Leadership Board (SBA Executive Branch Appointee), Programming Director for the Corporate and Business Law Society, 1L Representative for the Corporate and Business Law Society
Honors: Dean's Recognition for Professional Development

St. John's University, The Peter J. Tobin College of Business New York, N.Y.
B.S., *Magna Cum Laude*, in Finance (GPA: 3.94) May 2017
Activities: Management Advisory Consultant (Appointed advisor for nonprofit organizations), Treasurer of Phi Alpha Delta
Honors: Dean's List (all semesters 2013-17), Phi Eta Sigma (National honor society awarded to first-year students within top twentieth percentile of class), Omicron Delta Epsilon (International Economics Honors Society), Beta Gamma Sigma (International Business Honor Society for top 10th percentile of business undergraduates)

Professional Experience

U.S. Securities and Exchange Commission Washington, D.C.
Spring Intern, Student Honors Legal Program, Division of Corporation Finance, Office of Risk and Strategy January – April 2021

- Assessed reviews of public company filings and reviewed public comments received on rulemaking proposals
- Researched social corporate governance issues related to special purpose acquisition companies (SPACs)

Department of Justice New York, N.Y.
Fall Legal Intern, Antitrust Division August – November 2020

- Assisted with preparation for trial, substantive legal research, client interviews, and legal memoranda regarding per se violations of § 1 of the Sherman Act that deals with price-fixing, embezzlement, no-poach agreements, and fraud
- Drafted civil motions filed in federal court for the Department of Justice's Judgement Termination Initiative

U.S. Attorney's Office Washington, D.C.
Summer Law Intern, Major Crimes Unit June – August 2020

- Assisted a team of U.S. Attorney's with drafting legal memoranda for felony charges brought forth by the prosecution
- Assessed confidential information and drafted motions analyzing the implications of evidentiary matters for trial

St. John's University New York, N.Y.
Research Analyst August 2016 – December 2019

- Conducted empirical research on monetary transmissions of negative interest rates in the emerging economies realm
- Structured sovereign bond debt issuance databases for implications of Sub-Saharan African debt and borrowing
- Presented brief summary reports on macro-economic impact for pursuing prospective research with the World Bank

National Debt Relief, LLC New York, N.Y.
Creditor Escalations Specialist April 2019 – June 2019

- Negotiated legal accounts with law firms and hedge funds across the country representing top creditors and reviewed lawsuit status and legal documents including complaints, answers, and stipulations
- Assessed settlement options with settlement in full ratios predicated with structured payments on client's systematic and recommended deposit of funds in escrow

WinOne Dix Hills, N.Y.
Co-Founder and Owner October 2017 – April 2019

- Designed aspects of the application for back and front-end developers to implement for expected launch date
- Oversaw business operations and negotiated independent outsourcing contracts to monetize on driving traffic

UBS Financial Services Inc. Jericho, N.Y.
Lead Investment Strategy Intern August 2016 – October 2017

- Tracked and benchmarked investment performances and analyzed market projections with proprietary software and structured databases for investment modeling
- Trained incoming interns and evaluated work product assigned to senior investment strategists for review and performance

Certifications

- Latham & Watkins Mergers and Acquisitions Virtual Experience Program Certification (Issued June 1, 2020)

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

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INFORMATION SYSTEM

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Display Transcript

ST. JOHN'S UNIVERSITY

Display Academic Record

This is NOT an official transcript. Courses which are in progress may also be included on this transcript.

Transfer Credit Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Curriculum Information

Current Program

College: The Peter J. Tobin Coll of Bus

This is NOT an Official Transcript

DEGREE AWARDED

Awarded: Bachelor of Science **Degree Date:** May 21, 2017

Institutional Honors: Magna Cum Laude

Curriculum Information

Current Program

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	117.000	117.000	117.000	117.000	461.40	3.94
Transfer:	9.000	9.000	9.000	0.000	0.00	0.00
Degree:	126.000	126.000	126.000	117.000	461.40	3.94

TRANSFER CREDIT ACCEPTED BY INSTITUTION -Top-

FALL 2015: Hofstra University

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
ECO	0000	ECONOMICS	TC	3.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	3.000	3.000	3.000	0.000	0.00	0.00

Unofficial Transcript

JUNE 2016: CLEP EXAM

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
MKT	2301	PRINCIPLES OF MARKETING	TC	3.000		0.00
SPA	1020	SPANISH LEVEL II	TC	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	6.000	6.000	6.000	0.000	0.00	0.00

Unofficial Transcript

INSTITUTION CREDIT **-Top-**

Term: Fall 2013

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
DNY	1000C	Queens Campus	UG	CORE: DISCOVER NEW YORK	A	3.000	12.00	
ECO	1001	Queens Campus	UG	PRINCIPLES OF ECONOMICS I	A	3.000	12.00	
LST	1000	Queens Campus	UG	INTRO TO LIBERAL STUDIES	A	3.000	12.00	
MTH	1007	Queens Campus	UG	COLLEGE ALGEBRA & TRIGONOMETRY	A	3.000	12.00	
SPE	1000C	Queens Campus	UG	CORE: PUBLIC SPEAKING COLL STU	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	60.00	4.00
Cumulative:	15.000	15.000	15.000	15.000	60.00	4.00

Unofficial Transcript

Term: Spring 2014

Term Comments: DEAN'S LIST: 2013-2014

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
ACC	1007	Queens Campus	UG	FUNDAMENTALS OF ACCOUNTING I	A	3.000	12.00	
BLW	1001	Queens Campus	UG	LAW AND BUSINESS	A	3.000	12.00	
ECO	1002	Queens Campus	UG	PRINCIPLES OF ECONOMICS II	A	3.000	12.00	
ENG	1100C	Queens Campus	UG	CORE:LITERATURE IN GLOBAL CONT	A	3.000	12.00	
MTH	1009	Queens Campus	UG	CALCULUS I	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt	Passed	Earned	GPA	Quality	GPA

	Hours	Hours	Hours	Hours	Points	
Current Term:	15.000	15.000	15.000	15.000	60.00	4.00
Cumulative:	30.000	30.000	30.000	30.000	120.00	4.00

Unofficial Transcript

Term: Fall 2014

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
ENG	1000C	Queens Campus	UG	CORE: ENGLISH COMPOSITION	A-	3.000	11.10	
FRE	1010C	Queens Campus	UG	CORE:FRENCH LEVEL I	B+	3.000	9.90	
HIS	1000C	Queens Campus	UG	CORE:EMERGENCE GLOBAL SOCIETY	A	3.000	12.00	
MGT	2301	Queens Campus	UG	ADM & ORGANIZATIONAL BEHAVIOR	A	3.000	12.00	
PHI	1000C	Queens Campus	UG	CORE:PHILOSOPHY HUMAN PERSON	A-	3.000	11.10	
SCI	1000C	Queens Campus	UG	SCI INQ: ORIGINS AND CONFLICTS	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	18.000	68.10	3.78
Cumulative:	48.000	48.000	48.000	48.000	188.10	3.91

Unofficial Transcript

Term: Spring 2015

Term Comments: DEAN'S LIST: 2014-2015

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
ACC	2339	Queens Campus	UG	FUNDAMENTALS OF ACCOUNTING II	A-	3.000	11.10	
CIS	1332	Queens Campus	UG	COMPUTER & BUSINESS SOFTWARE	A	3.000	12.00	
ECO	1326	Queens Campus	UG	ECO HISTORY OF THE WESTERN COM	A	3.000	12.00	
ENG	2060	Queens Campus	UG	STUDY OF AMERICAN LITERATURE	A	3.000	12.00	
RMI	2301	Queens Campus	UG	PRINCIPLES OF RISK & INSURANCE	A-	3.000	11.10	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	58.20	3.88
Cumulative:	63.000	63.000	63.000	63.000	246.30	3.90

Unofficial Transcript

Term: Spring 2016

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
CIS	3352	Queens Campus	UG	DATABASE MANAGEMENT	A	3.000	12.00	
DS	2333	Queens Campus	UG	BUS & ECON STATISTICS I	A	3.000	12.00	
FIN	2310	Queens Campus	UG	FOUNDATIONS OF FINANCE	A-	3.000	11.10	
PHI	2220C	Queens Campus	UG	CORE:MORAL/ETHIC DIMEN OF BUS	A	3.000	12.00	
PHI	3000C	Queens Campus	UG	CORE: METAPHYSICS	A	3.000	12.00	
THE	1000C	Queens Campus	UG	CORE: PERS. ON CHRISTIANITY	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	18.000	71.10	3.95
Cumulative:	81.000	81.000	81.000	81.000	317.40	3.91

Unofficial Transcript

Term: Summer 2016

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
DS	2334	Online Learning	UG	BUSINESS & ECONOMIC STATS II	A	3.000	12.00	
THE	2320	Online Learning	UG	INTRO CATHOLIC SOCIAL TCHG	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	6.000	6.000	6.000	6.000	24.00	4.00
Cumulative:	87.000	87.000	87.000	87.000	341.40	3.92

Unofficial Transcript

Term: Fall 2016

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
FIN	3311	Queens Campus	UG	CORPORATE FINANCIAL ANALYSIS	A	3.000	12.00	
FIN	3312	Queens Campus	UG	INVESTMENTS	A	3.000	12.00	
FIN	3315	Queens Campus	UG	COMMERCIAL BANKING	A	3.000	12.00	
FIN	3316	Queens Campus	UG	FUND OF CAPITAL & MONEY MKTS	A	3.000	12.00	
FIN	4399	Queens Campus	UG	FINANCE INTERNSHIP	A	3.000	12.00	
MGT	3325	Queens Campus	UG	MANAGEMENT OF OPERATIONS	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	18.000	72.00	4.00
Cumulative:	105.000	105.000	105.000	105.000	413.40	3.93

Unofficial Transcript

Term: Spring 2017

Term Comments: DEAN'S LIST: 2016-2017

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
FIN	3318	Queens Campus	UG	INT'L BANKING AND FINANCE	A	3.000	12.00	
FIN	4314	Queens Campus	UG	REAL ESTATE FINANCE & INVEST	A	3.000	12.00	
MGT	4329	Online Learning	UG	MANAGERIAL STRATEGY AND POLICY	A	3.000	12.00	
THE	3305	Online Learning	UG	MORAL THEO OF THE MARKETPLACE	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	48.00	4.00
Cumulative:	117.000	117.000	117.000	117.000	461.40	3.94

Unofficial Transcript

TRANSCRIPT TOTALS (UNDERGRADUATE) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	117.000	117.000	117.000	117.000	461.40	3.94
Total Transfer:	9.000	9.000	9.000	0.000	0.00	0.00
Overall:	126.000	126.000	126.000	117.000	461.40	3.94

Unofficial Transcript

RELEASE: 8.7.1

The George Washington University Law School
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Washington, DC 20052

May 12, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing this letter on behalf of Ali Sarwari who is applying for a judicial clerkship position in your chambers. I am an adjunct professor at George Washington University Law School where I teach Government Lawyering and Pretrial Advocacy. I am also an Associate Director in the Office of International Affairs at the Public Accounting Oversight Board. Prior to that, I was an Associate Director in the PCAOB Division of Enforcement. In addition, I spent 16 years at the United States Department of Justice, Civil Division, Commercial Litigation Branch where I served as an Assistant Director.

I had the pleasure of having Ali in my Government Lawyering class this past fall semester. As a co-requisite for his internship at the Antitrust Division of the United States Department of Justice, Ali was able to explore the various aspects of working as a government lawyer with me, my co-professor, and his fellow classmates. During the semester we explored areas such as ethics, governmental privileges, the Freedom of Information Act, and the interplay among the various branches of Government and the differences between private and government practice. Since the class is a seminar, we try to engage the class in as much interactive learning as possible. We also bring in guest speakers to provide varying perspectives on government practice. Throughout the semester, Ali was always attentive, punctual, and provided feedback and insight in class discussions. Even with the challenges of the online environment, Ali was always an active participant to class and expressed real interest in the various topics we raised and in our visitors to class. Ali always provided a thoughtful and unique perspective to the issues raised in class. During the semester we assigned our class papers on policy considerations around transgender service members in the military and on governmental privileges. In both of those assignments Ali prepared thoughtful and thorough analyses that demonstrated his clear writing and intellectual curiosity. Further, at the end of the semester Ali gave a presentation to class on the Antitrust Division that displayed his ability as an excellent researcher and speaker. Based upon Ali's performance, including his outstanding participation and excellent written work, he earned a grade of B+ in my Government Lawyering class.

In sum, based on Ali's participation, and attentiveness in my class as well as his dedication, hard work and analytical skills, I believe he would be a welcome addition to your chambers. If you should need any additional information you can contact me at lorea@pcaobus.org.

Sincerely,

Alan J. Lo Re

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

June 01, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Ali Sarwari for a clerkship. Ali is a bright and capable rising 3L law student who would be an invaluable asset to your chambers.

Ali was my student in my first year Fundamentals of Lawyering class at The George Washington University Law School. This is a year-long course and he was one of 16 students in this small class. I feel qualified to appraise his writing skills, analytical ability, professional judgment, and work ethic, among other qualities.

Fundamentals of Lawyering encompasses the traditional legal research and writing curriculum, but filters it through a client service lens. Students represent a "client" in the fall and the spring and focus on "solving a problem" for their client and communicating those solutions. Ali's research and writing ability improved markedly throughout the academic year. Ali was prepared for every class, put the same effort into ungraded assignments as graded ones, and was eager to receive and incorporate feedback to improve his work. He sought my individual feedback frequently in an effort to improve his writing and worked diligently to master the art of well-researched, soundly reasoned, reader friendly communications. Ali shows a particular proclivity and aptitude for advocacy. He excelled in those types of assignments in my class, especially oral argument.

Ali's obvious and continued commitment to self-directed learning sets him apart from my other students. He has focused his time at GW not just on learning the law, but learning how to be a lawyer. In this vein, Ali recognized early the importance of complementing his doctrinal curriculum with experiential opportunities: he has completed an externship each eligible semester with the Securities & Exchange Commission, the Department of Justice, and the U.S. Attorneys' Office. He has sought out opportunities with GW's skills boards, excelling at both Mock Trial and Alternative Dispute Resolution.

He also availed himself to virtual learning opportunities during the pandemic, including completing the Latham & Watkins Virtual Experience Program. Finally, he completed the Dean's Certificate in Professional Development by attending weekly, voluntary programming designed to enhance student's critical professional skills, like empathy, listening, and client service. This work-ethic and self-directedness speak to Ali's continued commitment to developing his lawyering skills. It also reflects his understanding that "good lawyering" requires far more than just knowing (and regurgitating) doctrine. This well-rounded approach to lawyering will make him an excellent clerk.

These skills will make Ali a successful clerk and the type of lawyer our profession needs more of. I recommend him without reservation. If I can provide more information about his qualifications, please do not hesitate to contact me.

Sincerely,

Erika N. Pont
Visiting Professor of Law
Interim Associate Director, Fundamentals of Lawyering Program
The George Washington University Law School
202-412-9696
epont@law.gwu.edu

Ali Sarwari
The George Washington University Law School | (516) 312-5303 | asarwari@law.gwu.edu

Dear Honorable Judge,

The following writing sample is an appellate brief I wrote in our first-year writing program at the George Washington University Law School for the Northern District of Georgia. We were asked to cite to the record and come up with persuasive legal arguments from case law, restatements, publications, and other authorities for a fictitious Visual Artists Rights Act claim. The class was chosen, at random, to represent their respective parties and provide oral arguments from the briefs they submitted. In this case, I represented Peach Tree Bank, a regulated financial institution in Georgia, against Fleur, a renowned artist demanding that her artwork should not be taken down in the bank's atrium lobby. Prior to the submission of this assignment, students were asked to write a motion brief for the opposition to grant or deny a preliminary injunction and later argue the opposing side. An opinion was also issued in accordance to the ruling of the trial court and this brief advocates for the reversal of the trial court's ruling, specifically the grant of the preliminary injunction. The original document also entailed a table of contents, table of authorities, standard of review, certificate of compliance, certificate of service, and an argument addressing the other sections and preliminary factors – all of which has been omitted for the purposes of this sample. I hope you find this well and amusing.

With Warm Regards,

Ali Sarwari

STATEMENT OF THE ISSUES

The District Court granted Fleur a preliminary injunction preventing Peach Tree Bank (PTB) from destroying Fleur's artwork Eco Echo. The questions presented are whether the District Court abused its discretion in granting a preliminary injunction, when:

I. Fleur has not demonstrated a substantial likelihood of success on the merits of her underlying VARA claim because Eco Echo is:

(A) a "work for hire" created by Fleur while she was an employee of Peach Tree Bank and

(B) Eco Echo is not a work of recognized stature because it is neither meritorious nor is its recognition adequately recognized;

II. where Fleur will not suffer irreparable injury because, if any harm may result from the removal of her triptych, (1) her current notoriety attributing to the artwork has been established and (2) any injury therefrom would not be irreparable, the balance of the equities favors Peach Tree Bank, and the public interest does not favor injunction?

STATEMENT OF THE FACTS

Peach Tree Bank (PTB), a community financial institution has served Georgia since 1903. (R. at 021.) As part of PTB's culture initiative in 2017, they decided that being "green" is reflective of the values as a company. Id. In 2018, PTB commissioned Fleur to create an environmentally inspired artwork in its greenhouse-like garden in the bank's atrium lobby in which the agreement between the two parties was set forth in the "employee agreement" contract. Id. The bank then instructed Fleur that the artwork be a triptych, a three-part design, in accordance with the company's values and that the center panel prominently face the door subject to management approval. (R. at 010.) After permission was granted, the center panel

depicted an image of a woman with flowing hair the two flanking panels etched on concrete slabs with the words "Eco" and "Echo" respectively. (R. at 012). PTB was excited to feature the artwork after completion of the project and stated that the artwork was, "a fitting tribute to the cause of environmental stewardship." (R. at 033). However, PTB did not know that the artwork it had displayed was infamously linked to Fleur's affiliation with Green Lantern, a known Swedish environmental terrorist organization engaged in illegal activity. (R. at 029.) The organization flew drones at Heathrow airport which grounded over 1000 flights and caused mass delay around the holidays. Id. Fleur subsequently tweeted her lack of remorse for her criminal offense. (R. at 038.) Accordingly, PTB did not want to be affiliated with an artist known to have attract climate-change radicals and controversial environmental figures whom have adopted the hashtag, Eco Echo, on Twitter. (R. at 029.) PTB feels that Fleur no longer represents the bank's core values. (R. at 021.) As a result, one of their clients wants to pull out of a recent transaction discussed with PTB. Id. Eco Echo has been a rally point for these environmentalists and causes significant harm to the public's safety and the bank's reputation and its removal is imperative. (R. at 022.)

ARGUMENT

The Court may grant a preliminary injunction only if: (1) Plaintiff has a substantial likelihood to succeed on the merits; (2) Plaintiff will suffer irreparable injury in the absence of preliminary relief; (3) the alleged injury to Plaintiff outweighs the damage caused to Appellant; and (4) if issued, the injunction is in the public's interest. See McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998). The district court's decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion when it misapplies the law and the Court of Appeals then reviews legal determinations *De Novo.* A preliminary injunction is an

"extraordinary and drastic remedy," and may not be granted unless all four elements are established by a 'clear showing.' Id. Here, the Court abused its discretion in granting a preliminary injunction because none of the four requirements are met by a clear showing.

I. Fluer will not prevail on the merits of her claim because Eco Echo is an artwork commissioned by Peach Tree Bank and is therefore exempted under VARA as work for hire nor will Fleur prevail on the merits of Eco Echo being a work of recognized stature.

The district court abused its discretion by granting a preliminary injunction because Fleur did not demonstrate she could likely succeed on the merits of her underlying VARA claim. (R. at 002.) First, the artwork at issue is not protected under 17 U.S.C. §106A(a)(3)(B) because it is exempted as "Work Made for Hire," evidenced by the employee contract amongst other factors. (R. at 021.) Second, even if it is not a work made for hire, VARA protection still does not apply here because Eco Echo needs to be a work of recognized stature, in which it is not. See 17 U.S.C. §106A(a)(3)(B) (extending VARA protection to any intentional or grossly negligent destruction only to works of recognized stature). Either way, Fleur does not succeed on the merits of her VARA claim by a clear showing and the District Court's grant of preliminary injunction must be reversed.

Two factors determine Echo Eco as a work for hire: (1) a work prepared by an employer like Fleur acting within the scope of her employment to PTB; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas[1]. See 17 U.S.C. § 101. In determining

[1] It is uncontested that the second portion of the statute does not apply here because Eco Echo does not fall within any of the nine categories enumerated in the list. See 17 U.S.C. § 101

that Fleur is an employee and not an independent contractor, the Supreme Court has looked to agency law governing the relationship of the parties based on a multi-balancing factor test. See Reid, 940 U.S. at 751-52 (adopting thirteen factors from RESTATEMENT (SECOND) AGENCY § 220 in assessing employee status). While all thirteen factors are relevant and the weight of these factors is fact intensive, no single factor alone is dispositive. See Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992) (applying five factors germane to all cases concerning work for hire and should be applied here because those factors adequately capture work for hire status). Further, in balancing the *Reid* factors, a court must disregard those factors that, in light of the facts of a particular case, are (1) irrelevant or (2) of "indeterminate" weight— factors that are essentially in equipoise and thus do not meaningfully cut in favor of either determining Fleur as an employee or an independent contractor. See Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 114 (2d Cir. 2000).). In applying its analysis based on *Aymes* and *M.G.B.*, the District Court erred, as a matter of law, on the application of the relevant facts and the proper balance of the weight of these factors. See M.G.B. Holmes Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1492 (11th Cir. 1990). Therefore, reviewing *De Novo*, this Court should find the appropriate weighing of these factors and reverse the grant of the preliminary injunction. See McDonald's, 147 F.3d at 1306.

Here, the control of manner and requisite skill, a *Reid* factor weighing heavily that favors the bank, was dictated by PTB to hire Fleur as an employee to work on an artwork pursuant to the terms of the contract. (R. at 006.) While the right to control is not determinative of employee status, it bears a lot more weight than any other single factor, and the District Court narrowly ruled in favor for the Plaintiff from incomplete facts pertinent to this factor. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 112 S. Ct. 1344, 1348 (1992) (quoting Reid, 490 U.S. at

752, while applying all other factors and weighing control of manner and means of production most heavily). Control over the manner and means of production was demonstrated by the Plaintiff consulting with the building engineer for the Bank before proceeding with the project and submitted her initial designs for approval. (R. at 006.) The District Court should have further considered that control over the manner and means of production was evident by the center panel being featured prominently, instructed by the bank, that the panel should be in furtherance of the bank's initiative, and that Fluer should "go large," implicating her design and skill be sought out on the humungous concrete slabs that it was. (R. 004, 006, 009, 014.) This factor alone bears significant weight in favoring employer status to PTB. See Salamon v. Our Lady of Victory Hosp., 514 F.3d 217, 228 (2d Cir. 2008) (upholding Metcalf v. Mitchell, 269 U.S. 514, 521 (1926) to find the most important and heaviest bearing factor as the manner and means of production); accord Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 114 (2d Cir. 2000) (noting special emphasis on the manner and means test).

Further, other Reid factors such as the source of the instrumentalities and tools, the duration of the relationship between PTB and Fleur, the need for Fleur to not hire assistants, and the extent of Fleur's discretion over when and how long to work individually further makes Fleur an employee, not an independent contractor. See Metcalf, 269 U.S. at 521. Here, the duration of the project was agreed to be completed in its entirety for a year and the 40-hour work week requirement further limits the discretion over when and how long Fleur works and substantiates that the agreement between the parties was exactly like an employer contract stipulating the responsibilities of the hired party. (R. at 004, 005.) Pursuant to the agreement, Fleur was to be reimbursed, upon receipt, of the instrumentalities and tools used to complete the project. Id.

Applicant Details

First Name	**Brigid**
Last Name	**Sawyer**
Citizenship Status	**U. S. Citizen**
Email Address	**sawyerb@cua.edu**
Address	**Address** **Street** **2213 N. Van Dorn St., Apt. 101** **City** **Alexandria** **State/Territory** **Virginia** **Zip** **22304** **Country** **United States**
Contact Phone Number	**4135754846**

Applicant Education

BA/BS From	**Salve Regina University**
Date of BA/BS	**May 2016**
JD/LLB From	**The Catholic University of America, Columbus School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50903&yr=2009**
Date of JD/LLB	**May 21, 2021**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Catholic University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Stokes, Lee
lstokes@nsf.gov
703-292-580
Silecchia, Lucia
silecchia@law.edu

References

Donald J. Allison, Attorney; former Assistant United States Attorney for the District of Columbia
Phone: (413) 253-9700
Email: dja@aamllp.com

Paul Chung, Shareholder at Shulman, Rogers, Gandal, Pordy & Ecker, P.A.
Phone: (301) 230-5230
Email: pchung@shulmanrogers.com

The Honorable Mary-Lou Rup, former Massachusetts Superior Court Judge
Phone: (413) 575-4947
Email: mlrup@comcast.net

This applicant has certified that all data entered in this profile and any application documents are true and correct.

2213 North Van Dorn St., Apt. 101
Alexandria, VA 22304

September 6, 2020

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year law student at The Catholic University of America, Columbus School of Law. I was inspired to pursue a legal career because my time at a small firm taught me that every case could have a profound impact on a person's life. As a first-generation law student, I know being an attorney requires both intelligence and strong interpersonal skills, which I embody through my academic success and natural empathy. Working as your judicial clerk will offer me an opportunity to further develop my research and writing abilities while learning practical skills through courtroom experience. The District Court will challenge my efficiency and the effectiveness of my work. I can rise to that challenge due to my strong foundation in research and writing, coupled with my ability to balance many demanding commitments.

My academic experience with legal research and writing has been highly successful. During my first year of law school, my legal writing class was consistently one of my highest grades. The techniques I learned in that class still guide me in my writing today. In my second year, I participated in Law Review where I wrote a comment exploring the competing goals of land's economic productivity and individual land ownership. I also proposed a new definition of "highest and best use" in eminent domain valuation. My comment is scheduled to be published in the *Catholic University Law Review* next year. Both experiences refined my ability to draft well-supported and concise legal arguments, which ultimately prepared me for the wide variety of research and writing duties I will perform in a judicial clerkship.

My practical experience during law school helped develop my research and writing skills while working professionally in a team. As a law clerk at the National Science Foundation, Office of Inspector General, I researched issues related to developing cases, drafted memoranda, and created research summaries for attorneys and agents, which were used in briefing other attorneys and developing case theories. As a Low Income Tax Clinic student attorney, I worked in a team with another student and a supervising attorney. Our team was extremely cooperative because of our clear communication and mutual respect. This environment helped us create effective strategies for clients. On one particularly challenging case, I performed legal research and consulted with my team to determine the tax implications of a foreclosure. This research and collaboration assisted our client in choosing a strategy for their matter with the least negative tax consequences.

I have thrived in law school. My high GPA and class rank were achieved alongside active participation in extracurricular activities. Most notably, I organized an auction through my school's public interest law organization, which raised nearly $20,000. This money was awarded as stipends to law students in public interest legal internships. Throughout law school, I babysit regularly for a family with two children: a one-year-old and a four-year-old. This work requires me to exercise time management between my schoolwork and sitting commitments, use measured judgment, multitask, and triage the needs of each child.

I welcome discussion on my qualifications for this position. Thank you for your consideration.

Very truly yours,

Brigid C. Sawyer

BRIGID C. SAWYER
2213 North Van Dorn St., Apt. 101, Alexandria, VA 22304 • (413) 575-4846 • sawyerb@cua.edu

EDUCATION

The Catholic University of America, Columbus School of Law; Washington, DC
Juris Doctor, expected May 2021; GPA: 3.774; Rank: 7/91
Honors: 2020–21 Law Review Production Editor; Dean's List (Spring & Fall 2019; Spring 2020); Full-Tuition Merit Scholarship
Activities: Students for Public Interest Law; Women's Law Caucus; Black Law Students Association

Salve Regina University; Newport, RI
Bachelor of Arts, Political Science and Economics, *summa cum laude*, May 2016; GPA: 3.965
Honors: Phi Sigma Alpha, Member; Sigma Beta Delta, Member; Pell Honors, Scholar
Study Abroad: Oxford, England (Summer 2013)

EXPERIENCE

Shulman, Rogers, Gandal, Pordy & Ecker, P.A.; Potomac, MD
Summer Associate, June 2020 – July 2020
- Drafted pleadings and motions for cases pending in Maryland and District of Columbia trial courts
- Performed research regarding intellectual property, ethics rules, and the Federal Rules of Civil Procedure
- Prepared memoranda concerning matters such as property distribution and statutory interpretations
- Researched and prepared client alerts regarding employment law issues for publication and distribution

DOJ, Environment and Natural Resources Division, Land Acquisition Section; Washington, DC
Law Clerk, January 2020 – April 2020
- Drafted pleadings for condemnation cases and created title-related documents with Title Department
- Researched and wrote intra-office memoranda on matters such as Land Commission powers, state inheritance law applied to just compensation awards, and Federal Rules of Evidence interpretations

Columbus Community Legal Services, Low Income Tax Clinic; Washington, DC
Certified Student Attorney, August 2019 – December 2019
- Assisted clients with tax controversies by communicating with the IRS, advocating to challenge the liability, creating payment agreements, and producing offers in compromise
- Worked with supervising attorney to create and implement strategy options for clients

National Science Foundation, Office of Inspector General; Alexandria, VA
Law Clerk, May 2019 – August 2019
- Assisted attorneys, special agents, and investigative scientists with investigations into white collar crime, fraud, and administrative proceedings
- Researched relevant legal issues and delivered findings in presentations and memoranda
- Reviewed materials produced in response to subpoena and drafted memorandum outlining content

Allison, Angier & McHale, LLP; Amherst, MA
Legal Assistant, January 2017 – August 2018
Intern, September 2016 – December 2016
- Drafted pleadings and prepared administrative materials
- Performed legal research on real estate, criminal, and employment issues for pending cases
- Corresponded with clients concerning their case status and billing matters

The Honorable Mary-Lou Rup; Hampden County Superior Court, Springfield, MA
Judicial Intern, May 2016 – August 2016
- Observed ongoing cases at the Superior Court
- Discussed legal issues of current and upcoming cases with Judge Rup

Brigid Sawyer
The Catholic University of America, Columbus School of Law
Cumulative GPA: 3.774

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts	Marin R. Scordato	A-	4	
Legal Methods Workshop	Katherine G. Crowley & Bryan Jonathan McDermott	P	1	Pass/Fail Course
Criminal Law	Mary G. Leary	B	3	
Contracts	Antonio F. Perez	B+	3	Full Year Course
Lawyering Skills	Lisa Anjou Everhart	A	2	Legal Writing Course; Full Year Course
Civil Procedure	Kathryn Kelly	A-	3	Full Year Course

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Kathryn Kelly	A-	3	Full Year Course
Contracts	Antonio F. Perez	B+	3	Full Year Course
Constitutional Law I	Mark L.Rienzi	A	3	
Lawyering Skills II	Lisa Anjou Everhart	A	2	Legal Writing Course; Full Year Course
Property	Lucia Ann Silecchia	A+	4	

Dean's List

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Trusts & Estates	Lucia Ann Silecchia	A-	4	
Constitutional Law II	Mark L. Rienzi	A	3	
CCLS: Low Income Tax Clinic	Paul Harold Kurth & Laila Enid Leigh	A	4	
Corporations	Sarah H. Duggin	A-	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Issues In Corporate Law: Corporations & Human Rights	Sarah H. Duggin	A	2	
Family Law	Raymond C. O'Brien	B+	3	
Legal Externship	Bryan Jonathan McDermott	P	1	Pass/Fail Course
Evidence	Mary G. Leary	A+	4	
Becoming a Lawyer	Bryan Jonathan McDermott	P	1	Pass/Fail Course

Law Journal Writing (Law Review)	Alonzo G. Harmon	P	2	Pass/Fail Course

Brigid Sawyer
Salve Regina University
Cumulative GPA: 3.965

Exam Credits

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Transfer Elective	N/A	P	3	Pass/Fail Course
Literary Masterpieces	N/A	P	3	Pass/Fail Course
Introductory Macroeconomics	N/A	P	3	Pass/Fail Course
The American Political System	N/A	P	3	Pass/Fail Course

These courses were AP classes that my school accepted for college credit. Professor names are not reflected on my transcript.

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Humans and Their Environment	N/A	A	3	Biology General Education Class
Elementary Latin I	N/A	A	3	
Portal- Seeking Wisdom-Honors	N/A	A	3	General Education Class
New Student Seminar	N/A	A	1	
Introduction to Psychology	N/A	A	3	
History of Western Philosophy I	N/A	A-	3	

Honors: Dean's List. Professor names are not reflected on my transcript.

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to World Politics (Honors)	N/A	A	3	
Special Topic: Morality and Politics	N/A	A	3	
What it Means to be Human	N/A	A	3	English Course
Interpreting American History 1877-Present	N/A	A-	3	
Theatre Production I	N/A	A	1	
Elementary Latin II	N/A	A-	3	

Honors: Dean's List. Professor names are not reflected on my transcript.

Summer 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Political Philosophy, Ethics, & Rhetoric	N/A	A	3	
Literature of Oxford	N/A	A	3	

Summer Study Abroad at St. Clare's Oxford. Professor names are not reflected on my transcript.

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Classical Political Philosophy	N/A	A	3	
Mathematics in Social Sciences	N/A	A	3	
Constitutional Law and Development	N/A	A	3	
Feinstein Enriching America Program	N/A	P	0	
American Legal History	N/A	A	3	
Christianity Dialogue- World Religions	N/A	A	3	
Mentor Practicum	N/A	A	1	

Honors: Dean's List. Professor names are not reflected on my transcript.

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Modern Political Philosophy	N/A	A	3	
Acting in Film & Television	N/A	A	1	
Introductory Microeconomics	N/A	A	3	
Philosophy & Responsibility	N/A	A	3	
Human Biology: Physiology & Health	N/A	A	3	
American Government: Classic/Contemporary Reading	N/A	A	3	

Honors: Dean's List. Professor names are not reflected on my transcript.

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Comparative Economics & Political Systems	N/A	A	3	
Theatre History I	N/A	A	3	
Mentor Practicum	N/A	A	1	
Money and Banking	N/A	A	3	
Contemporary Africa	N/A	A	3	
Civil Liberties	N/A	A-	3	

Honors: Dean's List. Professor names are not reflected on my transcript.

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Political Economy Industrial Soc	N/A	A	3	
American Economic History	N/A	A	3	
Seminar/Research & Methodology	N/A	A	3	
International Trade & Global Corp	N/A	A	3	

Honors: Dean's List. Professor names are not reflected on my transcript.

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intermediate Macroeconomics	N/A	A	3	
Guided Research	N/A	A	3	
Public Finance & Public Policy	N/A	A	3	
Modern American Foreign Policy	N/A	A	3	

Honors: Dean's List. Professor names are not reflected on my transcript.

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Political Thought	N/A	A	3	
Workshop: Grant Writing	N/A	P	1	Pass/Fail Course
Economic Ideas in Historic Perspective	N/A	A-	3	
Intermediate Microeconomics	N/A	A	3	
Multi-Media Research Application	N/A	A	1	
The Capstone Experience	N/A	A	3	
Ethics	N/A	A	3	

Honors: Dean's List. Professor names are not reflected on my transcript.

National Science Foundation • Office of Inspector General
2415 Eisenhower Avenue, Alexandria, Virginia 22314

August 24, 2020

The Honorable Elizabeth W. Hanes
Albert V. Bryan US Courthouse
401 Courthouse Square
Alexandria, VA 22314

Re: Recommendation for Brigid C. Sawyer

Dear Judge Hanes,

I am writing to recommend Brigid C. Sawyer for a judicial clerkship in your chambers. I am an Investigative Attorney at the National Science Foundation, Office of Inspector General, Office of Investigations, and I supervised Ms. Sawyer during her tenure as a law clerk in our office in the summer of 2019. I enthusiastically recommend Ms. Sawyer and would hire her again.

From my experience, Ms. Sawyer is a highly motivated and independent worker. She was assigned research projects by several attorneys in our office, and I was impressed by her time management and communication skills. The responses I received from the other attorneys were uniformly positive, even glowing. They and I were particularly impressed with the questions she asked when given assignments which led to more focused research and a better final product. Her resulting work was well researched, well written and timely.

She was given complicated fact patters to research, and her creativity in searching beyond the obvious was regularly praised. For example, when asked to research the status of graduate students at a university for a specific case, she not only looked at the statute at issue, but also analyzed university policy and how graduate students were treated for purposes of Title VII employment law, Federal tax law, and applicable state law.

I worked with her extensively on multiple research and writing projects. She is an excellent writer and over the summer gained considerable skill in making complex legal topics accessible to and understandable by non-attorneys (i.e. federal special agents and scientists). Although we worked collaboratively to fine-tune her pieces, her worked required only minimal edits, and she responded positively to suggested refinements.

Ms. Sawyer was a pleasure to have in the office. She was professional and personable. She showed great facility working professionally with the special agents, scientists, and attorneys who staff our office. She also exhibited the coveted skill of disagreeing without being disagreeable. Also, of note, during the summer she worked with me, she also balanced multiple external

commitments, such as law school obligations and a second, part-time job, however, these commitments never interfered with her work or the products she produced.

She is in the highest tier of law clerks with whom I have worked since 2001. I believe that Ms. Sawyer will excel at any challenge she faces in her future and will be a boon to any entity that hires her. Please do not hesitate to contact me if you would like to discuss her aptitude for the position further.

Sincerely,

Lee Stokes
Investigative Attorney

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August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

My former student, Brigid Sawyer, is applying for a position as a clerk in your chambers after she graduates from Catholic University's Columbus School of Law in 2021. I recommend her to you most highly. Indeed, the highest recommendation I can offer you is that I was prepared to hire Ms. Sawyer myself as my research assistant this summer if she were not able to continue working at her firm due to the current pandemic.

I first met Ms. Sawyer in my Property course in the spring of 2019. She earned a very rare A+ in that course. I was delighted to see her enrolled in my Trusts & Estates course in the fall 2019 semester where, once again, she impressed me with an A- for the class. Both times, as you can see from her grades, she demonstrated a sophisticated understanding of complex material – both statutory and common law – and the ability to apply that material to intricate fact patterns. These skills will serve her well in any judicial clerkship.

Ms. Sawyer is also an outstanding writer. She exhibited this in her exam writing. However, I was able to observe this more directly when she asked me to serve as the "expert reader" for her Law Review paper. She wrote about the interplay between eminent domain and takings law and did an excellent job with both the research and writing of the paper as well as the development of her thesis. It was a pleasure to brainstorm with her through all the stages of the paper's development and to watch as she grappled with a complex academic writing project.

As you can see from Ms. Sawyer's transcript, she excelled in all of her classes. However, in addition to this, she was also a very well-rounded student leader here are CUA, taking an active leadership role in Law Review and in our Students for Public Interest Law group, among others. She has supplemented this with work experience and active engagement in our legal clinic.

I have been very impressed with all of my interactions with Ms. Sawyer. Her intelligence, work ethic, dedication to her work, and willingness to tackle difficult legal issues all bode well for a successful legal career. I hope that this career will start with a judicial clerkship. Ms. Sawyer has told me, with much enthusiasm, about her desire to do a judicial clerkship. With even more enthusiasm, I recommend Ms. Sawyer to you. If I may provide you with any additional information, please do not hesitate to contact me at 202-319-5560 or silecchia@law.edu.

With best wishes,

Lucia A Silecchia
Professor of Law

IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA	)	
EX REL.	)	
DAVID E. BARRIER, M.D.,	)	
PLAINTIFF,	)	Civ. Action No. 18-3456-SBM
v.	)	
TWIN OAKS HOSPITAL, INC.,	)	
DEFENDANT.	)	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

David E. Barrier, M.D., relator, a surgeon in Overland Park, brings this qui tam action to recoup lost taxpayer money from Twin Oaks Hospital's kickback scheme to gain Medicare referrals. Twin Oaks violated the False Claims Act ("FCA") and the Anti-Kickback Statute ("AKS") by submitting Medicare reimbursement claims tainted by illegal kickbacks. Twin Oaks entered a contract that paid The Crenshaw Group, a physicians' practice, to oversee health fairs, targeted to gain geriatric patients. Twin Oaks paid for the food, entertainment, staff, and transportation of senior citizens to the fairs. No other medical group participated. Since the contract's inception, patient referrals from The Crenshaw Group to Twin Oaks grew. Twin Oaks failed to show that no genuine dispute exists as to the legality of their contract or that it falls squarely within an AKS safe harbor provision. Since genuine disputes of material fact exist, Twin Oaks is not entitled to summary judgment.

STATEMENT OF FACTS

Barrier joined the Twin Oaks' staff in 2011 and was informed of the Twin Oaks – Crenshaw Group contract by Julia B. Courtland shortly after she resigned from Twin Oaks.[1] The

[1] Barrier Dep. 2:75, 4:224–27, Dec. 3, 2018. Courtland contacted Barrier on July 17, 2018. Courtland Dep. 3:121–24, Dec. 3, 2018. Courtland was the Director of Hospital Services at Twin Oaks from January 1, 2012 through July

contract was executed on February 28, 2018 and required The Crenshaw Group to oversee six health fairs per year over five years, with three fairs held at retirement centers owned by The Crenshaw Group and the other three held at a local civic center.[2] The Crenshaw Group was to receive $25,000.00 for the period.[3] In a staff meeting on February 1, 2018, Twin Oaks' Chief Financial Officer ("CFO") said in response to a delay in Crenshaw signing the contract, "What's he got to lose, seeing as it's no cost to them?"[4]

Andrew M. Crenshaw characterizes his practice's geriatric care as "one of the things [the practice is] particularly specialized in."[5] The Crenshaw Group oversaw the health fairs, but Twin Oaks paid for the food, entertainment, staff, and transportation of senior citizens to the event, even though there was accessible public transportation.[6] The entrance fee was discounted for senior citizens.[7] Twin Oaks held health fairs at its own facility in the past but doubled its budget and staff for the outsourcing last year.[8] After the May fair, Twin Oaks allowed The Crenshaw Group to exert influence over fair staffing decisions.[9] In a letter dated July 1, 2018 to Crenshaw,

31, 2018. Id. 1:48.

[2] Compl. ¶ 16. The fairs were scheduled in January, March, May, July, September, and November. Id. The Pavilion Center at River Crest opened in January 2018. Rinehart Dep. 2:75, Dec. 7, 2018.

[3] Rinehart Dep. 4:208. The Crenshaw Group owns three retirement centers: River Crest Retirement Community, Bluff View Retirement Community, and Valley Crest Retirement Community. Compl. ¶ 9.

[4] Courtland Dep. 3:126–29. Courtland spoke to the CFO after the meeting to clarify his statement and he said "the hospital was footing the entire bill and staffing the entire thing itself, for each of the fairs." Id. 3:133–35.

[5] Crenshaw Dep. 2:98–99, Dec. 7, 2018.

[6] Id. 3:150–54; Crenshaw Dep. Exs. A & C. Courtland told Barrier that Twin Oaks funded the fairs entirely and "no other hospital that co-sponsored health fairs or events in this area gave their co-sponsors such a deal." Barrier Dep. 4:226–27.

[7] Rinehart Dep. 3:177–4:180.

[8] Courtland Dep. 2:104–06. Rinehart and Crenshaw characterize the fairs as helping the community. Rinehart Dep. 4:210–11; Crenshaw Dep. 3:171-72. Rinehart sent a letter to Barrier on June 4, 2018, inviting his practice to participate in the fairs. Barrier Dep. Ex. A. Rinehart was aware Barrier could not accept this offer, as the demands of his practice require him to work on Saturdays when the fairs were conducted. Barrier Dep. 4:232–36.

[9] Rinehart Dep. 5:261–66; Ex. A. Regarding Crenshaw, Courtland stated "We had several disagreements over the years concerning how my staff should do their jobs. The problem was that Ms. Rinehart took his side, deferring to him because of his importance." Courtland Dep. 3:179–4:181.

Rosemary C. Rinehart stated that "any suggestions or comments you make as to the composition of that staff will be valued and acted upon[,]" and Courtland resigned on July 15, 2018.[10]

Only two fairs were held since the contract's inception, both at River Crest's Pavilion Center, in May and July 2018.[11] In 2018, the amount of Medicare referrals The Crenshaw Group sent to Twin Oaks from their retirement communities increased from past years.[12] To resolve a separate FCA action, Twin Oaks entered into a settlement agreement on March 15, 2017 with the Department of Health and Human Services ("HHS") conditioning its reimbursement of Medicare claims on compliance with all federal statutes, including the FCA and the AKS.[13]

ARGUMENT

Summary judgment is granted only, "if the movant shows that there is no genuine dispute as to any material fact[.]"[14] If the movant meets their burden, the nonmoving party must produce evidence outside the pleadings to support a genuine dispute of material fact.[15] If a jury could render a verdict for the nonmoving party, summary judgment must be denied.[16] All facts and inferences must be considered in the light most favorable to the non-moving party.[17] Materiality of facts depends on substantive law and if the fact affects the issues raised, while a genuine dispute exists when different inferences could be drawn from evidence presented.[18] The Tenth

[10] Rinehart Dep. Ex. A; Courtland Dep. 1:58–2:61.
[11] Rinehart Dep. 2:75. The September and November fairs were postponed. Id. 6:332–39; Crenshaw Dep. Ex. B.
[12] Crenshaw Dep. 3:132–37. Crenshaw estimated that sixty percent of The Crenshaw Group's business involves Medicare referrals. Id. 2:102–08. Of that, Crenshaw estimated that, prior to the increase in 2018, thirty-five percent are patients from The Crenshaw Group's retirement facilities requiring hospitalization are frequently referred to Twin Oaks. Id. 2:109–3:134. Rinehart estimated that forty-five percent of Twin Oaks' business is from Medicare referrals and twenty-five percent of those referrals come from The Crenshaw Group. Rinehart Dep. 5:294–6:303.
[13] Compl. ¶¶ 14–15. Twin Oaks has a compliance officer on staff, however, Rinehart raised Courtland's concerns about the contract to the compliance officer only "theoretically" and Twin Oaks decided against requesting an HHS opinion on the contract. Rinehart Dep. 5:283–85, 5:287–90.
[14] Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).
[15] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).
[16] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
[17] United States ex rel. Burlbaw v. Orenduff, 548 F.3d 931, 937 (10th Cir. 2008) (holding that all inferences must be drawn in favor of the relator in an FCA summary judgment motion).
[18] Anderson, 477 U.S. at 248; Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1377 (10th Cir. 1980).

Circuit has applied the summary judgment standard to FCA cases and other courts have disfavored summary judgment in FCA cases when credibility and intent were at issue.[19]

The FCA states, "any person who - knowingly presents . . . a false or fraudulent claim for payment or approval . . . is liable to the United States government[.]"[20] The AKS states, "Whoever knowingly and willfully offers or pays any remuneration . . . directly or indirectly . . . to any person to induce such person - to refer an individual to a person for the furnishing . . . of any item or service for which payment may be made . . . under a Federal health care program . . . is guilty of a felony[.]"[21] A qui tam relator is an individual who brings an FCA action on the government's behalf due to knowledge of violations.[22] The relator may proceed when the government elects not to join and the relator bears the burden of proof.[23] Genuine disputes of material fact exist as to whether Twin Oaks knowingly and willfully paid remuneration, whether it knowingly submitted false claims, and whether the contract fell within an AKS safe harbor provision.[24]

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[19] United States v. Boeing Co., 825 F.3d 1138, 1145 (10th Cir. 2016) ("When considering a defendant's motion for summary judgment on FCA claims, we accept as true the relators' evidence and draw all reasonable inferences in their favor."); United States v. Taber Extrusions, LP, 341 F.3d 843, 846 (8th Cir. 2003) (stating that summary judgment for the plaintiff should not be granted where defendant's intent is at issue); Graves v. Plaza Med. Centers Corp., 276 F. Supp. 3d 1335, 1345 (S.D. Fla. 2017) (stating that credibility issues must go to a jury).

[20] False Claims Act, 31 U.S.C. §§ 3729–3733, § 3729(a)(1)(A) (2012).

[21] Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2)(A) (2012). Under the Patient Protection and Affordable Care Act, an AKS kickback violates the FCA. Patient Protection and Affordable Care Act; Elder Justice Act, 111 Pub. L. No. 111-148, 124 Stat. 119 (2010), 42 U.S.C. § 1320a-7b(b)(2)(A) (2012); 42 U.S.C. § 1320a-7b(g). An FCA claim must be brought within six years of the violation or three years of when the violation was or should have been known. 31 U.S.C. § 3731(b). The claim brought by Barrier is well within the statute of limitations. Id.

[22] 31 U.S.C. § 3730(b)(1). In the FCA's 1986 amendments report, the House said qui tam actions are intended to encourage people with fraud information to come forward. H.R. Rep. No. 99-660, at 23 (1986). See United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) (stating that the 1986 amendments encourage actions the government cannot bring on its own and discourage actions it could already bring).

[23] 31 U.S.C. § 3730(c)(3). The Government must prove an FCA violation by the preponderance of the evidence. 31 U.S.C. § 3731(d); United States v. United Techs. Corp., 782 F.3d 718, 725 (6th Cir. 2015). The Government must prove an AKS violation beyond a reasonable doubt. United States v. Lahue, 261 F.3d 993, 1002 n.10–11 (10th Cir. 2001). The relator assumes all of the Government's responsibilities in a qui tam action. 31 U.S.C. § 3730(c)(3).

[24] It is undisputed that Twin Oaks and The Crenshaw Group are persons under the FCA and AKS and that Twin Oaks presented claims to Medicare for payment.

I. Genuine Disputes of Material Fact Exist as to Whether Twin Oaks "Knowingly and Willfully" Paid Illegal Remuneration in Exchange for Medicare Patient Referrals.

A. Twin Oaks Paid Illegal Remuneration in Exchange for Medicare Patient Referrals.

Under the AKS, an illegal remuneration consists of offering to pay or paying for referrals that are submitted for payment to a federal healthcare program when at least one purpose of the payment is to induce a person or organization to make referrals.[25] In United States v. Vap, the Tenth Circuit found a quid pro quo agreement between a witness to a corruption investigation, even though no direct evidence of the agreement existed.[26] The court found that a quid pro quo agreement is necessary for a kickback but only requires a tacit understanding, which can be established by circumstantial evidence.[27] In Vap, the court found that a kickback was established by circumstantial evidence of money exchanged for official favoritism.[28] Like the agreement in Vap, evidence of Twin Oaks' quid pro quo agreement with The Crenshaw Group may not be direct, but that should not foreclose a jury from ruling on circumstantial evidence. Twin Oaks should be denied summary judgment and the matter allowed to proceed to a trier of facts because disputes of material fact exist regarding evidence of illegal remuneration payments.

The "one purpose test" for identifying illegal remuneration was adopted by the Tenth Circuit in United States v. McClatchey.[29] In McClatchey, the court found the Chief Operating

[25] 42 U.S.C. § 1320a-7b(b)(2)(A); United States v. McClatchey, 217 F.3d 823, 834–35 (10th Cir. 2000); United States v. Greber, 760 F.2d 68, 69 (3d Cir. 1985). "Remuneration" was added to the AKS in the 1977 amendments to resolve interpretation issues and broaden the government's ability to prosecute violations. Franklin T. Pyle, III, The Federal Anti-Kickback Statute Has No Preemptive Power, Or Does It? Florida Supreme Court Holds Florida's Medicaid Anti-Kickback Statute Unconstitutional, 112 Penn St. L. Rev. 631, 636 (2007). See Hanlester Network v. Shalala, 51 F.3d 1390, 1398 (9th Cir. 1995) superseded by statute, Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (applying the 1977 amendment's broad definition of remuneration to determine if a physicians' practice violated the AKS by paying for referrals to their laboratories).
[26] United States v. Vap, 852 F.2d 1249, 1251, 1255 (10th Cir. 1988).
[27] Id. at 1255.
[28] Id. See also United States v. Polin, 194 F.3d 863, 864–65 (7th Cir. 1999) (finding that an illegal remuneration agreement existed when a CVS doctor and nurse offered a pacemaker seller fifty dollars per referral sent to them).
[29] McClatchey, 217 F.3d at 835 (adopting the one purpose test from Greber, 760 F.2d at 69).

Officer of a medical center paid doctors a fee to bring referrals to the medical center.[30] The COO argued that inducing referrals needed to be the primary purpose of the remuneration.[31] The Tenth Circuit rejected this argument and held that the AKS is violated if "one purpose of the offer or payment is to induce Medicare . . . patient referrals."[32] Twin Oaks' contract is similar to the COO's conduct in McClatchey, since it intended the fairs to provide a community service, but could have also used the fairs, in part, to gain Medicare referrals. As to the legality of the contract under the AKS, a genuine dispute of material fact remains.

B. Twin Oaks "Knowingly and Willfully" Paid Illegal Remuneration.

Under the AKS's scienter requirements, a relator must show remuneration was paid "knowingly and willfully."[33] Circuit courts have applied the Supreme Court's definition of "knowingly and willfully" to AKS specific cases.[34] The First Circuit held that "knowingly" requires the defendant to act deliberately or voluntarily.[35] The Eighth Circuit found "willfully" to mean knowing the conduct was wrong, not knowing it violated a "known legal duty."[36] In health law, Congress and federal courts only require proof that the defendant knew the action was unlawful.[37] Because Twin Oaks' CFO stated the contract cost The Crenshaw Group nothing and Twin Oaks decided to double its budget for the health fairs, the inference exists that Twin Oaks knew both entities would be compensated for these losses in the future. Additionally, Twin

[30] Id. at 827–28.
[31] Id. at 834.
[32] Id. at 835. See also United States v. Hagstrom, No. CR 04-120-R, 2006 WL 1285087, at *8 (W.D. Okla. 2006) (using the McClatchey test and finding that a lab paid remunerations to doctors in part for Medicare referrals for lab tests).
[33] 42 U.S.C. § 1320a-7b(b)(2)(A).
[34] Bryan v. United States, 524 U.S. 184, 191–93 (1998). The AKS does not require a specific intent to defraud. 42 U.S.C. § 1320a-7b(b)(h).
[35] United States v. Bay State Ambulance & Hosp. Rental Serv., 874 F.2d 20, 33 (1st Cir. 1989).
[36] United States v. Jain, 93 F.3d 436, 441 (8th Cir. 1996).
[37] United States v. St. Junius, 739 F.3d 193, 210–11 (5th Cir. 2013) (holding that the Government only needs to prove that a contractor willfully sought or received remuneration, not that it knowingly violated the AKS).

Oaks' decision not to seek an HHS opinion and Rinehart's discussion of the contract's validity only theoretically with the compliance officer implies Twin Oaks knew the contract was wrong.

Under the FCA, the relator must show the fraudulent claim was submitted for payment "knowingly," defined as "a person, with respect to information[,] has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information; and requires no proof of specific intent to defraud."[38] In defining actual knowledge, a district court within the Tenth Circuit held a defendant needs knowledge of falsity that is more than a mistake.[39] In non-FCA contexts, the Ninth Circuit defined "deliberate ignorance" as "(1) a subjective belief in a high probability that a fact exists, and (2) deliberate actions taken to avoid learning the truth," and a district court applied this definition in an FCA case.[40] The Tenth Circuit has interpreted reckless disregard as aggravated gross negligence.[41] Given the CFO's statement and the fact that a compliance officer reviewed the contract, a reasonable jury could find the illegal remuneration was not a mistake. If actual knowledge could not be established, deliberate ignorance can be shown through Twin Oaks' refusal to seek an HHS opinion. If deliberate ignorance could not be established, gross negligence can be shown through Rinehart asking the compliance office theoretically if Twin Oaks should seek HHS's opinion. As to the AKS and FCA scienter requirements, genuine disputes of material fact remain.

[38] 31 U.S.C. § 3729(b)(1)(A)(i)–(iii).
[39] United States ex rel. Trim v. McKean, 31 F. Supp. 2d 1308, 1316 (W.D. Okla. 1998).
[40] United States v. Yi, 704 F.3d 800, 804–05 (9th Cir. 2013); Siebert v. Gene Sec. Network, Inc., 75 F. Supp. 3d 1108, 1116–17 (N.D. Cal. 2014). See also St. Junius, 739 F.3d at 206 (stating that "a deliberate ignorance instruction is appropriate when a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance").
[41] Burlbaw, 548 F.3d at 945 n.12. United States v. Krizek, 111 F.3d 934, 942 (D.C. Cir. 1997) cited with approval by Urquilla-Diaz v. Kaplan Univ., 780 F.3d 1039, 1058 (11th Cir. 2015) (applying a congressional statement that gross negligence could apply to situations where carelessness or lack of review in claim submission results in mischarges to the government).

II. Genuine Disputes of Material Fact Exist as to Whether Twin Oaks Was Protected Under the Personal Service Contract Safe Harbor and Engaged in an Illegal Joint Venture.

A. Twin Oaks' Contract Does Not Comply with the Service Contract Safe Harbor.

The AKS safe harbors protect certain types of health care arrangements from prosecution and Twin Oaks contends the contract falls into the personal services contract safe harbor, which states, "'[R]emuneration' does not include any payment made by a principal to an agent as compensation for the services of the agent, as long as all of the following seven standards are met[.]"[42] Since the provisions are silent on the burden of proof, courts have placed the burden on the defendant, recognizing that a safe harbor acts as an affirmative defense.[43] Courts construe safe harbor provisions to require strict compliance with all elements.[44] Twin Oaks' contract does not fall within the safe harbor because it violates the fifth standard, requiring compliance with fair market value, which the personal services contract safe harbor does not define.[45] HHS's supplemental information states this safe harbor's fair market value, "was predicated on

[42] 42 U.S.C. § 1320a-7b(b)(3)(E); 42 C.F.R. § 1001.952(d) (2018). The seven standards are:

> "(1) The agency agreement is set out in writing and signed by the parties. (2) The agency agreement covers all of the services the agent provides to the principal for the term of the agreement and specifies the services to be provided by the agent. (3) If the agency agreement is intended to provide for the services of the agent on a periodic, sporadic or part-time basis, rather than on a full-time basis for the term of the agreement, the agreement specifies exactly the schedule of such intervals, their precise length, and the exact charge for such intervals. (4) The term of the agreement is for not less than one year. (5) The aggregate compensation paid to the agent over the term of the agreement is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. (6) The services performed under the agreement do not involve the counselling or promotion of a business arrangement or other activity that violates any State or Federal law. (7) The aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the commercially reasonable business purpose of the services."

Id.

[43] United States v. Rogan, 459 F. Supp. 2d 692, 716 (N.D. Ill. 2006), aff'd, 517 F.3d 449 (7th Cir. 2008); United States v. Williams, 218 F. Supp. 3d 730, 742 (N.D. Ill. 2016).

[44] Bay State Ambulance, 874 F.2d at 31–32; United States ex rel. Bartlett v. Ashcroft, 39 F. Supp. 3d 656, 677 (W.D. Pa. 2014).

[45] 42 C.F.R. § 1001.952(d)(5).

requirements similar to those set forth in the provisions for space and equipment rental."[46] These safe harbors require fair market value be commensurate with general commercial rates and not account for referrals which may result from the contract.[47]

Fair market value can be distorted by under or overvaluing a contract.[48] In United States v. Rogan, the court found an AKS violation when a healthcare administrator paid physicians to refer their patients to a hospital.[49] The agreement did not fall into a safe harbor because the price of the contract was well above market value.[50] By the same token, the HHS OIG stated that pricing contracts below market value may not qualify for this safe harbor since it could influence organizations to pick lower cost services, generating revenue from referrals.[51] Twin Oaks' contract valued The Crenshaw Group's space rental and doctors' time at less than fair market value and the parties made windfall profits on the reimbursements. The contract's fair market value was likely distorted to encourage patient referrals and corresponding profits from Medicare reimbursements. As to the safe harbor provision, genuine disputes of material fact remain.

B. Twin Oaks' Contract is an Illegal Joint Venture.

The Tenth Circuit defined elements of a joint venture as: "(1) a joint interest in the subject matter; (2) an express or implied agreement to share in the profits and losses of the

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[46] 42 C.F.R. § 1001 (1991) (discussing background information when the safe harbors were proposed).
[47] 42 C.F.R. § 1001.952(b)(6).

> "[T]he term fair market value means the value of the rental property for general commercial purposes, but shall not be adjusted to reflect the additional value that one party . . . would attribute to the property as a result of its proximity or convenience to sources of referrals or business otherwise generated for which payment may be made in whole or in part under Medicare[.]"

Id. Equipment rental fair market value is similarly defined. Id. § 1001.952(c)(6).
[48] Rogan, 459 F. Supp. 2d at 723; Office of Inspector Gen., U.S. Dep't of Health & Human Servs., OIG Advisory Op. No. 16-12 (Dec. 5, 2016) (finding that an agreement for a lab providing free services to dialysis facilities to retain the business of certain facilities might violate the AKS).
[49] Rogan, 459 F. Supp. 2d at 700.
[50] Id. at 723. See United States ex rel. Arnstein v. Teva Pharms. USA, Inc., No. 13 Civ. 3702 (CM), 2016 WL 750720, *18 (S.D.N.Y. Feb. 22, 2016) (finding that a drug company offering doctors a speaking fee in exchange for writing prescriptions for the company's drugs was not protected by the personal services contract safe harbor because the fees charged were not consistent with fair market value of the services provided).
[51] OIG Advisory Op. No. 16-12, supra note 48.

venture; and (3) action or conduct showing cooperation between the parties in the venture."[52] Some joint ventures do not qualify for safe harbor protection.[53] The HHS OIG identified examples of ventures that may violate the AKS, such as where physicians become investors in a business entity, refer their patients to the entity, and are paid by the entity.[54] These entities often aim to gain a "stream of referrals" from the physician.[55] While The Crenshaw Group did not invest directly, it worked with Twin Oaks to put on the fairs and offered discounted services, such as the space rental and the doctors' time. The contract implicitly allowed the entities to share in the profits from Medicare referrals. As to the joint venture, a genuine dispute of material fact remains.

CONCLUSION

As genuine disputes of material fact exist as to whether Twin Oaks violated the FCA and the AKS, Plaintiff, David E. Barrier, M.D., respectfully requests that the Court deny the Defendant's Motion for Summary Judgment and docket the case for trial.

[52] Okland Oil Co. v. Knight, 92 F. App'x 589, 604 (10th Cir. 2003) (citing Martin v. Chapel, Wilkinson, Riggs & Abney, 637 P.2d 81, 85 (Okla. 1981)).
[53] Office of Inspector Gen., U.S. Dep't of Health & Human Servs., Ad. Bulletin on Contractual Joint Ventures, 68 Fed. Reg. 23,148, 23,148 (April 23, 2003).
[54] Office of Inspector Gen., U.S. Dep't of Health & Human Servs., Publication of Special Fraud Alerts, 59 Fed. Reg. 65,372, 65,373–74 (Dec. 19, 1994).
[55] Id. at 65,374.

Applicant Details

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Applicant Education

BA/BS From	**Rhode Island School of Design**
Date of BA/BS	**June 2016**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 20, 2022**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Criminal Justice Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Internal Competition — Fall 2020** **Skye Donald Competition — Spring 2020**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Bryant, Taimie
Bryant@law.ucla.edu
(310) 206-3763

Michaels, Jon
Michaels@law.ucla.edu
(310) 267-4760

Grady, Mark
Grady@law.ucla.edu
(310) 206-1856

References

Daniel Bussel, Professor of Law
bussel@law.ucla.edu
(310) 206-7977

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jacob M. Schuerger
129 YORK STREET, APT. 8G, NEW HAVEN CT, 06511 SCHUERGER@UCLA.EDU (917) 636-5826

The Honorable Elizabeth W. Hanes
United States District Court
for the Eastern District of Virginia
Robinson & Merhige U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

June 14, 2021

Re: Judicial Clerkship Application

Dear Judge Hanes:

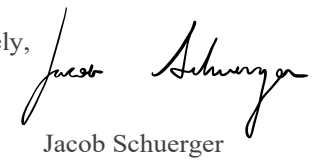
I am a rising third-year law student at UCLA School of Law. I write to express my interest in serving as a law clerk in your chambers for the 2022–2023 term or any subsequent one-year term. I am serious and adaptable, and I approach my work with humility and good humor. My academic and professional experience will make me an asset to your chambers.

I received my Bachelor of Fine Arts from Rhode Island School of Design. Through iterative artmaking and the practice of giving and receiving critique, I became versed in resourcefully executing complex projects. In my professional career prior to attending UCLA School of Law, I proved myself as a self-starter, routinely designing protocol and managing many moving parts at the art production company I founded. The experience of building a business instilled in me a tireless work ethic and the ability to achieve outsized results with a small team. My appetite for problem-solving brought me to law school, and it is my newfound passion for legal analysis that draws me to a clerkship in your chambers.

At UCLA School of Law and through an internship with the U.S. Court of Appeals for the First Circuit, I have sharpened my legal research and writing skills. Drafting opinions and writing legal memoranda as an intern to Judge Selya prepared me to succeed as a law clerk. Moreover, my coursework, including Federal Courts and Administrative Law, will allow me to engage deeply with work in your chambers. My participation in various moot court competitions enabled me to hone my advocacy and communication skills. Whereas my involvement in several clinics, including the El Centro Clinic with Legal Aid Foundation of Los Angeles, further strengthened my analytical skills and interpersonal skills.

Enclosed please find a copy of my resume, law school transcript, writing sample, and letters of recommendation from Professors Bryant, Grady, and Michaels. I am available to interview in person, or by phone or video. I appreciate your consideration and I look forward to hearing from you.

Sincerely,



Jacob Schuerger

Jacob M. Schuerger
129 YORK STREET APT 8G, NEW HAVEN CT, 06511 SCHUERGER@UCLA.EDU (917) 636-5826

EDUCATION

AUG 2019–MAY 2022 **UCLA School of Law**
Juris Doctor Candidate
GPA . . . . . 3.6 (Overall), 4.0 (Spring 2021)
JOURNAL . . . . . Criminal Justice Law Review, *Vice President of Production*
MOOT COURT . . . . Skye Donald Competition, 2020
Internal Competition, 2020
AWARDS . . . . . Bucerius Legal Tech Challenge, *Second Place*, 2020
Dean's Scholarship, 2019–2022

SEPT 2008–FEB 2016 **Rhode Island School of Design**
Bachelor of Fine Arts, Sculpture
GPA 3.65
LEADERSHIP. . . . . Art History Division, *Teaching Assistant*
HONORS . . . . . Dean's List Spring 2010 & Spring 2011

EXPERIENCE

MAY 2020–AUG 2020 **U.S. Court of Appeals for the First Circuit** . . . . . PROVIDENCE, RI
Judicial Intern to the Honorable Bruce M. Selya
Drafted opinions and bench memoranda for civil and criminal cases
Spearheaded research and writing for a telecommunications case
Proofed draft opinions and wrote memos suggesting edits and changes

SEPT 2019–MAR 2020 **El Centro Skid-Row Clinic** . . . . . LOS ANGELES, CA
Legal Services Volunteer
Interviewed clients at risk of losing housing
Analyzed legal issues relevant to landlord disputes and eviction
Drafted pro se letters and filed complaints with city agencies

JUNE 2016–JULY 2019 **Idex Object LLC dba Unnamed Studio** . . . . . NEW YORK, NY
Founder
Designed and built a photography production studio and gallery for artists
Established LLCs and negotiated commercial leases for three locations
Negotiated, drafted, and enforced contracts for 500 productions annually
Built relationships with clients including Condé Nast, HBO, and Uber

OCT 2013–MAY 2016 **The Eddy** . . . . . PROVIDENCE, RI
Bartender
Coordinated a team of employees for fast-paced cocktail service
Fostered a convivial atmosphere and resolved disputes discreetly
Streamlined accounting protocol increasing accuracy of EOD reports

SERVICE

2020 **Labor & Economic Justice Clinic,** *Unemployment Assistance Volunteer*
2019 **Homelessness Prevention Clinic,** *Outreach Volunteer*
2019 **Public Counsel,** *Adoption Day Volunteer*
2018 **NYC Board of Elections,** *Poll Clerk Serving Disabled Voters*

University of California, Los Angeles
LAW Student Copy Transcript Report

For Personal Use Only

This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name:	SCHUERGER, JACOB MORRIS
UCLA ID:	705442966
Date of Birth:	11/12/XXXX
Version:	08/2014 | SAITONE
Generation Date:	June 07, 2021 | 08:38:45 PM
	This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/26/2019

SCHOOL OF LAW

Major:

LAW

Specializing in BUSINESS LAW - TAXATION TRACK

Specializing in LAW AND PHILOSOPHY

Degrees | Certificates Awarded

None Awarded

Previous Degrees

None Reported

California Residence Status

Nonresident

Fall Semester 2019

Major:
LAW

INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LGL RSRCH & WRITING	LAW 108A	3.0	9.9	B+
PROPERTY	LAW 130	4.0	13.2	B+
TORTS	LAW 140	4.0	13.2	B+
CIVIL PROCEDURE	LAW 145	4.0	13.2	B+
LAWYERING REAL WRLD	LAW 160	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	17.0	17.0	49.5	3.300

Spring Semester 2020

CONTRACTS	LAW 100	4.0	0.0	P
LGL RSRCH & WRITING	LAW 108B	2.0	0.0	P
CRIMINAL LAW	LAW 120	4.0	0.0	P
CONSTITUT LAW I	LAW 148	4.0	0.0	P
SOCIAL SCIENCE	LAW 165	1.0	0.0	P

SPRING 2020: DUE TO COVID-19, THE SCHOOL ADOPTED MANDATORY P/U/NC GRADING WITH EXCEPTIONS FOR CERTAIN CATEGORIES OF CLASSES AND STUDENTS.

	Atm	Psd	Pts	GPA
Term Total	15.0	15.0	0.0	0.000

Fall Semester 2020

ADMINISTRATIVE LAW	LAW 216	4.0	14.8	A-
ANTITRUST LAW I	LAW 240	4.0	13.2	B+
COPYRIGHT LAW	LAW 302	4.0	0.0	P
PROP 13:LW,HIST,POL	LAW 536	3.0	12.0	A

	Atm	Psd	Pts	GPA
Term Total	15.0	15.0	40.0	3.636

Spring Semester 2021

FEDERAL COURTS	LAW 212	4.0	0.0	P
SECURED TRANSACTNS	LAW 250	4.0	16.0	A
POLTICL THRY FOUND	LAW 610	3.0	12.0	A
PR ISSUES BUS TRANS	LAW 652	2.0	8.0	A
DRUG DEV & PHARM	LAW 980	1.0	4.0	A

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	40.0	4.000

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	25.0	25.0	N/a	N/a
Graded Total	36.0	36.0	N/a	N/a
Cumulative Total	61.0	61.0	129.5	3.597

Total Completed Units 61.0

END OF RECORD
NO ENTRIES BELOW THIS LINE

RHODE ISLAND SCHOOL OF DESIGN

Two College Street, Providence, Rhode Island 02903

Transcript of Academic Record

Office of the Registrar

Date Printed : 06/08/2021
Page : 1 of 1

Record of: Jacob Morris Schuerger
1 Arlington Place
Brooklyn NY 11216

Student ID : 1052043
Date of Birth : 11/12/XXXX
Program : Undergraduate
Major : Sculpture
Degree Awarded : Bachelor of Fine Arts
Date of Graduation : June 2016

SUBJ	NO	TITLE	CRD	GRD	PTS
		TRANSFER CREDIT			
ENGL	8500	AFTER HOLLYWD:US CIN OF 70'S	3.0	T	0.0
		Earned Hrs GPA Hrs Points GPA			
TERM:		3.00 0.00 0.0 0.000			
CUMULATIVE:		3.00 0.00 0.0 0.000			
		FALL 2008			
FOUND	1001	DRAWING	3.0	B	9.0
FOUND	1003	TWO-DIMENSIONAL DESIGN	3.0	A-	11.1
FOUND	1005	THREE-DIMENSIONAL DESIGN	3.0	A	12.0
ENGL	E101	ENGLISH COMP. & LIT. I	3.0	B	9.0
ARTH	H101	HIST. OF ART&VISUAL CULTURE 1	3.0	B+	9.9
		Earned Hrs GPA Hrs Points GPA			
TERM:		15.00 15.00 51.0 3.400			
CUMULATIVE:		18.00 15.00 51.0 3.400			
		WINTERSESSION 2009			
FAV	W503	FILM EXPLORATIONS	3.0	A	12.0
		Earned Hrs GPA Hrs Points GPA			
TERM:		3.00 3.00 12.0 4.000			
CUMULATIVE:		21.00 18.00 63.0 3.500			
		SPRING 2009			
FOUND	1002	DRAWING	3.0	B	9.0
FOUND	1004	TWO-DIMENSIONAL DESIGN	3.0	A	12.0
FOUND	1006	THREE-DIMENSIONAL DESIGN	3.0	A-	11.1
ARTH	H102	TOPICS:20TH C. MODERNISMS	3.0	B+	9.9
HPSS	S101	TOPIC: REVLTN CAPITAL & WAR	3.0	B	9.0
		Earned Hrs GPA Hrs Points GPA			
TERM:		15.00 15.00 51.0 3.400			
CUMULATIVE:		36.00 33.00 114.0 3.455			
		FALL 2009			
SCULP	4745	SOPHOMORE SCULPTURE: STUDIO I	6.0	A	24.0
SCULP	4706	WOOD&METAL SHOP PRACTICE I	3.0	A-	11.1
SCULP	4714	FIGURE MODELING	3.0	B+	9.9
HPSS	S560	VISUAL PERCEPTION	3.0	B-	8.1
SCULP	4765	THE ARTIST'S MACHINE:	3.0	A-	11.1
		Earned Hrs GPA Hrs Points GPA			
TERM:		18.00 18.00 64.2 3.567			
CUMULATIVE:		54.00 51.00 178.2 3.494			
		WINTERSESSION 2010			
ENGL	E242	BOB DYLAN:'IT AIN'T ME BABE'	3.0	A	12.0
		Earned Hrs GPA Hrs Points GPA			
TERM:		3.00 3.00 12.0 4.000			
CUMULATIVE:		57.00 54.00 190.2 3.522			
		SPRING 2010			
SCULP	4716	SURVEYING 20TH CENT. SCULPTURE	3.0	A	12.0
SCULP	4746	SOPHOMORE SCULPTURE STUDIO II	6.0	A-	22.2
SCULP	4707	WOOD&METAL SHOP PRACTICE II	3.0	A-	11.1
FAV	5121	EXPERIMENTAL FILM TECHNIQUES	3.0	A	12.0
		Earned Hrs GPA Hrs Points GPA			
TERM:		15.00 15.00 57.3 3.820			
CUMULATIVE:		72.00 69.00 247.5 3.587			
		FALL 2010			
SCULP	4721	JUNIOR SCULPTURE: STUDIO I	6.0	A	24.0
SCULP	4691	CASTING STUDIO: ADV. CASTING	3.0	B	9.0
LAEL	LE47	WITH A PEN OF LIGHT	3.0	A-	11.1
		Earned Hrs GPA Hrs Points GPA			
TERM:		12.00 12.00 44.1 3.675			
CUMULATIVE:		84.00 81.00 291.6 3.600			
		SPRING 2011			
SCULP	4739	JUNIOR SCULPTURE STUDIO II	6.0	A	24.0
SCULP	4725	JUNIOR SCULPTURE SEMINAR	3.0	A	12.0
ARTH	H579	FRENCH SURREALISM	3.0	A	12.0
J&M	4441	JEWELRY INTRODUCTION	3.0	A-	11.1
		Earned Hrs GPA Hrs Points GPA			
TERM:		15.00 15.00 59.1 3.940			
CUMULATIVE:		99.00 96.00 350.7 3.653			
		SPRING 2015			
SCULP	4798	SENIOR SCULP DEGREE PROJECT	6.0	B+	19.8
HAVC	H652	SYNAGOGUES,CHURCHES,MOSQUES	3.0	A	12.0
SCULP	3218	3D MODELING	3.0	A	12.0
		Earned Hrs GPA Hrs Points GPA			
TERM:		12.00 12.00 43.8 3.650			
CUMULATIVE:		111.00 108.00 394.5 3.653			
		FALL 2015			
SCULP	4717	SENIOR SCULPTURE: STUDIO I	6.0	A-	22.2
HAVC	H345	ART OF US 1865-PRESENT	3.0	B+	9.9
HPSS	S569	ARCHAEOLOGY: THE WESTERN MIND	3.0	A-	11.1
		Earned Hrs GPA Hrs Points GPA			
TERM:		12.00 12.00 43.2 3.600			
CUMULATIVE:		123.00 120.00 437.7 3.648			
		WINTERSESSION 2016			
TEXT	4706	KNITTING: INTERACTIVE ENVIRON	3.0	A	12.0
		Earned Hrs GPA Hrs Points GPA			
TERM:		3.00 3.00 12.0 4.000			
CUMULATIVE:		126.00 123.00 449.7 3.656			

Degree Received: Bachelor of Fine Arts in 06/2016
Majors.....: Sculpture

End of official record.

THE COLLEGE NAME APPEARS IN WHITE PRINT ACROSS THE FACE OF THIS RECORD

A PHOTOCOPY OF THIS TRANSCRIPT IS NOT OFFICIAL

Recipient
Jacob Morris Schuerger
1 Arlington Place
Brooklyn NY 11216

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to any other party without the written consent of the student.

RHODE ISLAND SCHOOL OF DESIGN RISD 1877

This official college transcript does not require a raised seal. An official signature is white with a burgundy background.

Alison Sherman
Registrar

EXPLANATORY NOTES AND AUTHENTICITY STATEMENT APPEAR ON REVERSE SIDE

UCLA School of Law

TAIMIE L. BRYANT
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-3763
Email: bryant@law.ucla.edu

April 4, 2021

Dear Judge:

Jacob Schuerger asked that I write a letter in support of his application for a clerkship. I am happy to recommend him as I know him to be a mature individual with a strong intellect and work ethic. Jacob has particular skill in identifying and analyzing problems in legal situations and, also, in pursuit of solutions. For instance, he and a classmate designed an internet-based approach to contesting civil asset forfeitures, which may be abused by the police claiming that particular items of property were used in a crime. Their interactive program tied for second in a highly competitive national contest, Law for Everyone.

I have known Jacob since his first semester in law school, when he was enrolled in my small section of Property. Jacob was always prepared and consistently participatory in ways that advanced the discussion. From the very beginning, Jacob contributed to class at a very high level. His questions before revealed depth of preparation and understanding. He did well both when he was called on and when he volunteered.

Since that Property class was a small section of approximately 40 students, students were required to write two ungraded assignments. The first was a practice response to an actual exam essay question. It contained elements of the property law topics of recording, adverse possession, and nuisance. Jacob was able to weave together facts and legal analysis rather than first stating the rule and then laboriously analyzing facts. He efficiently combined both, demonstrating that he could accurately understand and analyze the facts in relation to relevant common law concepts.

The second assignment involved drafting a conveyance for a client. In order to encourage collaborative work, I asked students to work in pairs or trios to produce conveyancing language that used estates in land/future interests and/or covenants that run with the land. Jacob paired with another student with whom he drafted a unique client situation and also the response to the client. The work product involved a skillful mix of covenant and estates in land language to accomplish the client's objectives. The assignment also called for the students to discuss why they had drafted the language as they had. They then described what could be wrong with it and what questions would be necessary to ask the client before going further. As drafters of the initial language, Jacob and his assignment partner could have had great difficulty identifying gaps and challenges with their own work product, but they identified several places that would require further consultation with the client.

Jacob wrote a strong exam. All first-year courses are subject to a mandatory curve, and final exams are graded without knowledge of the exam-taker's identity. Jacob scored consistently well on both the essay and multiple-choice sections of the exam, indicating mastery of technical detail (tested

with multiple-choice questions) and understanding of how different areas of property law fit together (tested with essays).

In short, Jacob's written work in the ungraded assignments was of very high quality, and both those assignments and his participation in class exhibited a strong work ethic that included preparation with clear understanding of why reading materials and written work had been assigned. I know him to be non-defensive when offered constructive criticism, and I think that he has considerable ability to master difficult material on his own.

Finally, my interactions with Jacob lead me to believe that he is an optimistic, intelligent, hard-working person of integrity and maturity. I am confident that he will become a fine lawyer who contributes meaningfully to the community, and I hope that you will give his clerkship application serious consideration.

Sincerely,

Taimie L. Bryant

UCLA School of Law

JON MICHAELS
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 267-4760
Email: michaels@law.ucla.edu

May 10, 2021

Dear Judge:

Jacob Schuerger, one of my stronger and most intellectually curious Administrative Law students this year, is applying for a position in your Chambers. I am pleased to share with you my enthusiastic recommendation.

Jacob excelled in my Fall 2020 Administrative Law class. In normal times and under normal conditions, all of my students are "on call" every day. Given the stresses and logistical challenges of distance learning during a pandemic, I've relaxed those expectations considerably, relying instead exclusively on volunteers. Predictably, that decision resulted in uneven participation. But that uneven participation enabled me to get to know Jacob better and get to evaluate him with far greater frequency. It thus became immediately clear to me (and remained that way throughout the semester) that Jacob took his assignments seriously, gave the materials a close and careful read, and arrived "in" class ready to answer questions pertaining to doctrine, to the policy implications of statutes, rules, and judicial opinions, and to the benefits and downsides of various institutional arrangements. Needless to add, it is always a pleasure to have such a cheery, thoughtful, and generous contributor in class.

Where Jacob really stood out, though, was in office hours (which were likewise conducted via Zoom). Jacob figured prominently among a small, steady group who attended every week, seeking enrichment not extra help. Jacob clearly had an excellent command of the assignments, knew the caselaw cold, and—quite impressively (particularly for a first semester 2L)—had a good feel for the basics of constitutional theory and interpretive methodologies. What Jacob craved most were deeper discussions of the twists and turns and the ebbs and flows one might associate with the modern administrative state. It was apparent that Jacob was doing quite a bit of outside reading. He was reading about such things as the rise of the welfare state, the deregulatory period that started in the late 1970s, and the neoliberalism that characterizes a good deal of what's been going on in administrative governance over the past twenty or so years. In discussing these issues and events quite closely related to what we were studying in class, Jacob managed to get several of his classmates similarly invested in these fairly deep dives into history, political economy, and even sociology.

Make no mistake, though, Jacob is hardly a lost-in-the-clouds thinker. His final exam corroborated what I had been observing all semester—namely, that this was a student who mastered the doctrine, demonstrated considerable dexterity with policy questions, and had a knack for forceful yet economical expository writing.

The final exam tested Jacob and his classmates on everyday administrative law doctrines, on the constitutional status of administrative agencies, on the design of agencies, on the virtues and vices of private regulatory schemes, and on the interplay of law and politics in rulemaking and enforcement

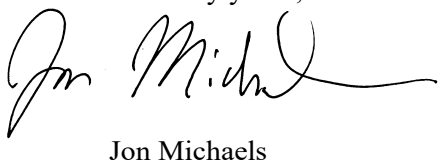
proceedings. As I just suggested, Jacob wrote clearly, inventively, and capaciously. He showed that he could do big picture thinking from, yes, way up in the clouds. But at the same time he made clear to me that he was just as nimble when charged with going deep down in the doctrinal or statutory weeds in order to provide close, crisp readings.

My Fall 2021 batch of exams was exceptionally strong, arguably the strongest I've had in the ten or so times I've taught the course. Jacob did a fantastic job. He was just a tad less thorough than the small handful of students who received As. Specifically, Jacob lost a couple of points here and there because he did not anticipate and engage with some counterarguments and because he failed to give a fuller airing to the biggest weaknesses in the positions he was advancing. Given our rather stringent curving policy, that was enough to drop him down to an A-. It should go without saying but an A-, particularly in this class, is nothing to sneeze at. It's even more stellar given the fact that Jacob's academic background in a nontraditional one. For college, he attended a highly competitive but specialized art school, and thus hasn't had nearly as much formal training in, say, a reading-and-writing intensive cognate field.

* * *

Clearly, I am a big fan of Jacob's. In fact, I miss our office hour conversations immensely and am already nudging him to sign up for one or two of my course offerings this coming academic year. Jacob's still on the upward slope of his learning curve; I am impressed with how far he's already come and have no doubt that he will continue to rise. Indeed, he's well on his way to becoming a standout young lawyer. He's bright, inquisitive, mature, and a pleasure to chat with. (He has also, in his former life as a bartender, "[r]esolved disputes discreetly" and thus surely is a skilled and circumspect mediator!) For all of these reasons, I am sure Jacob will be a fast learner in Chambers and a real asset not only to you but also to his co-clerks. For all of these reasons, he merits my enthusiastic endorsement.

Sincerely yours,



Jon Michaels

UCLA School of Law

MARK F. GRADY
DISTINGUISHED PROFESSOR OF LAW
DIRECTOR, CENTER FOR LAW AND ECONOMICS

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-1856
Email: grady@law.ucla.edu

March 16, 2021

Re: Jacob Schuerger

Dear Judge:

I am writing on behalf of my student, Jacob Schuerger, who has applied for a clerkship in your chambers.

On my Torts exam I give the class a real case to analyze. In Jacob's semester, this case was Ivery v. New York City Transit Authority, No. 502648/2016, 2018 N.Y. Slip Op. 51788(U) (N.Y. Sup. Ct. 2018. The students had not read this case before the exam, and I doubt that any of them could have predicted what case it would be, because the pre–announced range of possibilities included all eras and a variety of tort doctrines. In any event, the *Ivery* case was a res ipsa case in which a collapsing retaining wall derailed the defendant's subway train, causing injuries to the plaintiff and others. The plaintiff moved the New York Supreme Court (a trial court) for partial summary judgment on the issue of liability.

Jacob correctly predicted that the court denied this motion. He noted that such motions by plaintiffs are rarely granted and that this was a weak case for this result. The retaining wall collapsed because of a water-intrusion problem over which the defendant lacked complete control. Jacob analogized this case convincingly to several precedents that came to the same result (denial of a plaintiff's motion for summary judgment in a res ipsa case). His analysis was cogent, convincing, and well-written.

This past semester Jacob was a student in my Antitrust class. I gave the same type of exam in which the students again had to analyze a recent case. The case the students analyzed was In re McCormick & Company, Inc., 217 F.Supp.3d 124 (D.D.C. 2016). This was an alleged hub-and-spoke agreement in which McCormick reduced the contents of its pepper tins while keeping the tins themselves the same size. Because McCormick collaborated with large dealers like Walmart in playing the same trick with house brand pepper tins, that plaintiff argued that it was a hub-and-spoke arrangement to limit output.

Jacob correctly saw that the court would refuse to regard the arrangement in that way. As the court found, there may have been deception, which could be redressed under the consumer protection laws, but no antitrust violation because there was no real restriction of output. Again, to come to this conclusion, Jacob analogized to several close antitrust precedents.

Jacob is an excellent clerkship candidate, and I recommend him highly to you. I would certainly welcome the opportunity to speak to you about Jacob's qualifications. My office number is (310) 206–1856, and my cell phone number is (310) 948–7974.

Sincerely,

Mark F. Grady
Professor of Law and
Director, Center for Law and Economics

Jacob M. Schuerger
129 YORK STREET APT 8G, NEW HAVEN CT, 06511 SCHUERGER@UCLA.EDU (917) 636-5826

Writing Sample

Title: The Propriety of Restrictive Settlements in Mass Tort Litigation

Course: Professional Responsibility Issues in Business Transactions, Litigations, and Reorganizations.
Term: Spring 2021

The following is the entirety of a paper prepared for a seminar completed in the Spring of 2021. This work product is entirely my own and has not been edited by any other person.

This paper examines the use of two types of restrictive settlement provisions: secrecy agreements and practice-restrictions. These settlement practices raise important questions about the nature and purpose of the courts. Honing-in on the mass tort context, I advance the argument that existing rules should be both expanded and more robustly enforced.

Jacob Schuerger Spring 2021

The Propriety of Restrictive Settlements in Mass Tort Litigation

This paper examines the use of two types of restrictive settlement provisions: secrecy agreements and practice-restrictions. These settlement practices raise important questions about the nature and purpose of the courts. Honing-in on the mass tort context, I advance the argument that existing rules should be both expanded and more robustly enforced.

The first big break in the Dalkon Shield litigation arrived when Minneapolis firm Robins, Zelle, Larson & Kaplan reached a settlement with A.H. Robins, manufacturer of the contraceptive device that injured thousands. [1] Plaintiff's attorney Roger Brosnahan credited his firm's success to the supervision of Judge Miles Lord, claiming that Lord "opened up the discovery process" and made "the system work[]" the way it should.[2] In this statement, Brosnahan contrasts this case with countless other cases where plaintiffs' claims wither and die in a system that often seems designed to protect powerful corporate defendants. Judge Lord did not let A.H. Robins manipulate the discovery process. As illustration, when the company insisted Mr. Robins was too feeble to testify in Minneapolis, Lord ordered the aging executive face deposition at the corporation's headquarters and the judge flew to Virgina to officiate. Thorough discovery is what made all the difference for the claimants represented by Robins, Zelle. And this discovery paved the way for the settlement of many more claims. Indeed, the settlement was notable not for the 200 plaintiffs it compensated, but for its terms allowing Robins, Zelle to prepare a catalog of materials obtained in discovery for distribution to future claimants.

[1] RICHARD B. SOBOL, BENDING THE LAW 22 (1991); Morton Mintz, *Robins Sets Dalkon Payments*, WASH. POST (Nov. 24, 1984) (noting that Robins, Zelle attorney Michael V. Ciresi proclaimed the terms unprecedented for their "provisions designed to ease settlement of thousand [sic] of other shield suits pending nationwide").
[2] Mintz, *supra* note 1. A.H. Robins also blamed Lord. The company filed judicial misconduct proceedings against the judge for his seemingly deep and personal interest in the case. SOBOL, *supra* note 1, at 20–21. The proceedings were quickly dismissed. *Id.*

The act of releasing discovery materials upon settlement treats the fruits of discovery like the product of a public institution—which they are. While such a characterization is not without its critics, courts *are* public institutions and the products of courts—including legal precedents, rules, and factual records—arguably ought to be viewed as public goods.[3] Through this lens, we can view information learned in discovery as a public good that should be valued above the private good of settlement itself. This is especially desirable in the context of complicated mass tort and toxic tort suits where a class of plaintiffs might form without a defendant[4]; or an injury presents itself but the full scope of the class of claimants is wildly uncertain, as was the case in the Dalkon Shield litigation. In these types of cases, restrictions on information learned in discovery can substantially frustrate the development of the case. Yet, it is increasingly common for settlements to contain secrecy provisions that limit future access to discovery materials.[5] Although they might run afoul of the law on other grounds, there is not a separate rule prohibiting secrecy provisions in settlement agreements.[6]

Supporters of adding a rule regulating secrecy draw parallels to the rule of professional responsibility that prohibits lawyers from "agreeing to restrict their future practice as part of a settlement."[7] ABA Model Rule 5.6(b) provides that a lawyer shall not offer or make "an

[3] Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, HOFSTRA L. REV. 783, 790 (2002) (arguing for increased protection against settlement agreements that bury information uncovered in discovery); *c.f.* Stephen Gillers, *A Rule Without a Reason*, A.B.A. J., Oct. 1993 (arguing, primarily along freedom of contract lines, for the repeal of settlement rules prohibiting practice restrictions); Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291 (2005) (same).

[4] As in the Woburn water pollution case where a Leukemia cluster presented but victims and counsel could only guess after a defendant. See JONATHAN HARR, A CIVIL ACTION 251 (1995).

[5] David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217 (reporting that the practice is "thriving").

[6] Koniak, *supra* note 3.

[7] Dana & Koniak, *supra* note 5.

agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." The ABA explains that this rule against no-sue agreements is meant to increase public access to experienced lawyers.[8] Critics of Rule 5.6 argue that the rule is unnecessary because market forces naturally create lawyer availability.[9] Professor Gillers contends not only that Rule 5.6 is a "rule without a reason" but that it hampers useful and expeditious settlement agreements, especially in the mass tort context.[10] No doubt, Gillers' critique is particularly resonate when examining the course of the Dalkon Shield litigation. An entire cottage industry formed around suing A.H. Robins; there the market did provide plenty of available lawyers eager to collect as many claims as possible.[11] This effect may even have been caused by no-sue agreements. Sobol recounts that the Robins, Zelle settlement ended the firm's participation in Shield litigation.[12] It is unclear from Sobol's account whether this was explicit in the settlement agreement or if the firm independently chose to decline representing future claimants. It is not unreasonable to assume it was the former.[13] If that is the case, two aspects of this case study corrupt Gillers' argument.

First, the market did not fill with lawyers of equivalent skill but rather with inexperienced practitioners.[14] As experienced firms settled early cases, speculator and arbitragers filled the field. Second, the market for *Shield* claims was greatly aided—if not wholly created—by the

[8] ABA Formal Op. 93-371 (1993) ("access of the public to lawyers").
[9] *See Rule Without a Reason*, *supra* note 3, at 118.
[10] *Id.*
[11] SOBOL, *supra* note 1.
[12] *Id*. at 22.
[13] *See* MODEL RULES ANN. R. 5.6(b) cmt. (noting that settlements including practice restrictions "are particularly common in class actions . . . mass product liability or disaster claims")
[14] Consider Friedberg for instance, the encyclopedia salesman who bought claims and eventually settled with A.H. Robins' insurer after conducting close to no discovery. SOBOL, *supra* note 1.

circulation of the discovery catalog. By making their materials available, Robins, Zelle significantly reduced the value of its continued participation and thus reduced the harm caused by the firm's agreement to sit out future litigation. Perhaps this should lead us to conclude that any one of the two types of restrictions is acceptable. And thus, that the Rules should prohibit at least one restriction but need not prohibit both. We can imagine, however, a case where either one of the two types of restriction is enough to functionally end litigation of the matter.

When market forces do not align to properly incent advocacy, potentially valuable cases can fall through the cracks. Such a case may only come to fruition if it finds its way to a lawyer crazy enough to take it on. Take for instance the Woburn water pollution litigation brought—in defiance of constant pleas from his partners—by attorney Jan Schlictmann.[15] At Schlictmann's insistence, his firm threw caution to the wind and literally *went for broke* developing an extensive record that, among other things, pushed the very bounds of medical science.[16] Still, in the end, Schlictmann had so little evidence actually linking the defendant that the judge found he had brought a frivolous and unsupported claim in violation of Rule 11. But for the fact that he was right, Schlictmann was crazy to represent the plaintiffs. The point being that Schlictmann might not have been easy to replace—simply, there may not have been a market for the *Woburn* plaintiffs to turn to. Here, while the extensive and groundbreaking discovery had value, it may not have been value without Schlictmann because, even with the materials he uncovered, another lawyer still might not take the case.

[15] HARR, *supra* note 4.
[16] *Id*. (recounting the firm's financing of numerous rounds of laboratory tests revealing results that contradicted the hypotheses of experts).

Despite its universal adoption, some courts refused to enforce Rule 5.6(b).[17] A common rebuke argues that traditional freedom of contract trumps the interests of a professional responsibility rule.[18] Supporters of allowing no-sue provisions argue that permitting them would not prohibit a lawyer from declining to enter one.[19] Granted, if we were to repeal—or cease to enforce—Rule 5.6(b), nothing would force a lawyer like Schlictmann to enter into a restrictive settlement. Likewise, Gillers and Painter argue that a lawyer owns their future availability and should be free to sell it if they wish.[20] This raises the question whether a particular settlement is an appropriate place for a plaintiff's attorney to sell their future labor. Surely, settlement ought to focus on the client's interests. Further, in a settlement, a client sells their personal claim; a client should not be able to sell something they do not own and a client most definitely should not be understood to own their attorney's future labor in other matters, nor the right to control that labor.[21] The same may be said for a clients right to sell the contents and result of a lawsuit.[22]

While courts serve the function of settling private disputes—and the arguably desirable function of producing settlements, which amount to private goods but also end lawsuits early and thus conserve public resources—critics of secret settlements dwell on the overwhelmingly public nature of the Courts. Courts are public institutions and at least some products of courts surely are public goods.[23] But how far can we take this argument, and does it justify settlement rules

[17] *See* Lee v. Dep't of Ins. & Treasurer, 586 So. 2d 1185 (Fla. Dist. Ct. App. 1991); Feldman v. Minars, 658 N.Y.S. 2d 614 (N.Y. App. Div. 1997); Shebay v. Davis, 717 S.W. 2d 678 (Tex. Crim. App. 1986).
[18] *E.g*. *Feldman*, 658 N.Y.S. 2d 614; *Free the Lawyers*, *supra* note 3.
[19] *Free the Lawyers*, *supra* note 3.
[20] *Id.*
[21] Dana & Koniak, *supra* note 5, at 1221.
[22] *Id*. at 1220 (suggesting that the results of a lawsuit are the product of the public courts).
[23] Koniak, *supra* note 3, at 790; *see* discussion *supra*, at note 3.

against practice restrictions and against secrecy? This inquiry requires us to consider the nature of courts and the entire judicial project—a massive topic that will not be resolved here, but we can at least scratch the surface.

Jonathan Harr recounts an exchange between Professor Nesson and Judge Skinner during preparation for the Woburn trial. The episode began with the professor's proposition that the Woburn case should send a broad message to corporations across the nation.[24] The Judge countered that "lawsuits are between parties . . . . If the boardrooms of America happen to notice . . . that's an incidental consequence of the process. It's not the purpose of it."[25] Certainly, as Skinner asserts, the court system is adversarial, tuned to address cases and controversies—politics and political messages are properly left to the political branches. But does it follow that courts and rule makers should stifle the ability of a settlement to send a message to similarly situated tortfeasors? Is deterrence not one of the main goals of the tort system? Judge Lord took a different tack in an interview several years after presiding over Dalkon Shield cases in Minnesota. "The whole cost-benefit analysis is warped" said the Judge of corporate calculus, explaining that companies find that they "can kill so many people if the benefits are great enough."[26] Lord's cynicism was warranted; A.H. Robins consistently prioritized their bottom line above the safety of their customers. Lord's solution is "to make it too expensive to kill" and he proposes that "[o]nly the courts" are up to that task.[27] Under his view, the primary purpose of

[24] HARR, *supra* note 4, at 251(quoting Judge Walter J. Skinner c. 1986).
[25] *Id*.
[26] *Judgement Day: An Interview with Miles Lord*, THE MULTINATIONAL MONITOR (May 1987), https://multinationalmonitor.org/hyper/issues/1987/05/interview-lord.html.
[27] *Id.*

courts in enforcing tort law is to deter dangerous behavior and they achieve this by awarding damages.

Applying Judge Lord's conception to our discussion of secret settlements, it is clear that these restrictive agreements waste judicial resources by squandering a settlement's deterrent potential. Further, if the tort system is serious about providing full recovery to victims, it is wasteful to bury the information collected in one settlement if it could be useful for collecting recovery in another claim—or another one hundred thousand claims. But this brings us back to Professor Gillers' critique of Rule 5.6. He argues that restrictions on freedom of contract come at the expense of more valuable and expeditious settlement terms for the primary plaintiffs.[28] If Gillers is right, can we justify rules that take from today's plaintiff to deter the would-be offenders of tomorrow and ease recovery by future plaintiffs?

Dana and Koniak push back on Gillers arguement. They propose that "[i]f settlement in itself is a social good, it is because it reduces the transaction costs of litigation and reduces the load on overburdened courts."[29] Secret settlements controvert this benefit by increasing the litigation costs of future litigation.[30] Here, it could be argued that future litigators will still need to go through discovery and complete their own depositions. While this may be true, the Dalkon Shield litigation provides and illuminating case study. There, the availability of the catalog undoubtedly lowered costs. Further, Dana and Koniak argue that if our only goal is reducing the

[28] *Rule Without a Reason*, *supra* note 3.
[29] Dana & Koniak, *supra* note 5, at 1224–25.
[30] *Id*.

burden on courts, we should just start closing the courts and eliminating causes of action.[31] The reason for prohibiting restrictive settlements is greater than negotiating a single quick settlement. It is that we do not want to sellout the entire tort system just to earn a fast settlement for one group of plaintiffs. Dana and Koniak put it bluntly, "[a] regime that fails to meet . . . deterrence and compensation goals is normatively unattractive, even if it is characterized by a very high rate of quick settlements."[32]

Here, the best counter argument is that if we are actually serious about the public interest angle of private litigation, why do we only address it with Rule 5.6(b), especially while other rules contradict the very project.[33] On this point, Gillers and Painter argue that no other rules treat information gathered in legal representation as a public good that must further a socially beneficial goal.[34] Furthermore, they point to several loopholes that frustrate the mission of 5.6(b). They argue that Rule 5.6(b), standing alone, is meaningless if defendants can, for instance, conflict-out plaintiffs' lawyers by engaging them in consulting agreements post-litigation, or enter into confidentiality agreements—negotiated and court ordered—that restrict an attorney's use of material across cases.[35] With these suggestions, Gillers and Painter make a persuasive argument not for abandoning 5.6(b) but rather for strengthening it. If the first step is rejuvenating Rule 5.6(b) by ensuring that it is actually enforced, the next steps are to address the gaps in the rules that undermine the rule, and to draft a rule to cover secret settlements.

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[31] *Id*. at 1225.
[32] *Id.*
[33] *Free the Lawyers*, *supra* note 3, at 311–312 (arguing against the proposition that "information and experience should not be subject to private contracting that imposes external costs on the public at large").
[34] *Id. at* 313.
[35] *Id*.

On balance, critics of restrictive settlements have the more persuasive argument. The mass tort litigation examples, noted above, strongly support the view that existing rules should be both expanded and more robustly enforced. Brosnahan exalted the power of discovery when properly managed. Allowing secret settlements only serves to chip away at its power. Likewise, practice restrictions do not serve a justifiable function in the free market for legal services and can actually constrain and distort the market. Finally, in blessing either restriction, courts allow claimants to sell what is not theirs to sell. Courts should robustly enforce Rule 5.6(b) and the ABA ought to consider a rule prohibiting secret settlements.

Applicant Details

First Name	**Daniel**
Last Name	**Schwaber**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **843 Somerset Drive** City **Charleston** State/Territory **West Virginia** Zip **25302** Country **United States**
Contact Phone Number	**2023066589**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**May 2015**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 23, 2021**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**American University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**American University Washington College of Law Moot Court Honor Society**

Bar Admission

Admission(s) **West Virginia**

Prior Judicial Experience

Judicial Internships/ Externships **No**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Laufgraben, Eric
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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

DANIEL BENJAMIN SCHWABER | 600 H Street NE, Washington, DC | danny.schwaber@gmail.com | 202.306.6589

August 19, 2020

Dear Judge Hanes,

I am a third-year student at American University Washington College of Law on a Dean's Merit Scholarship, and I would be honored to serve as your law clerk for the 2021-2023 terms.

I completed my first two years at American in the top 5% of my class, earning a 3.92 GPA, with the highest-grade designation in Torts, Public Law, and both semesters of my Legal Rhetoric courses. I am the Deputy Senior Articles Editor for the *American University Law Review*, a member of the *Law Review*'s Diversity and Inclusion Subcommittee, and also earned a position on the Moot Court Honors Society. I have served as a law clerk on two United States Senate Committees. This summer, I am working as a law clerk with the Maryland Office of the Public Defender's Appellate Division, gaining valuable research and writing experience. There I am drafting briefs, working on Petitions for Writs of Certiorari, and conducting various legal research assignments. I have enclosed my resume but am providing here a brief background on my experiences.

After graduating from the University of Michigan's Gerald R. Ford School of Public Policy in 2015, I joined Hillary Clinton's campaign as a member of the policy team. There, I helped coordinate 1,500 policy experts as part of the Policy Outreach Operation and then was one of the first staffers on the Clinton-Kaine Transition, where I was the primary assistant to the four co-chairs and two co-directors.

Following the campaign, I worked at the Center for American Progress as a member of the K-12 Education Policy Team, where I was able to further develop my policy research, writing, and communications skills. In the year before law school, I served as the sole policy advisor on a congressional primary race in Texas, and later as the Deputy Policy Director on the Texas Gubernatorial race.

Last summer I worked as a law clerk with the Senate Committee on Health, Education, Labor, and Pensions with the oversight and investigations office. At the Committee I worked closely with Committee Counsel to conduct legal research, memo drafting, letter drafting, and document review for the office. Additionally, this past fall semester I worked in the Senate Judiciary Committee supporting the office of Senator Chris Coons. In this role, I worked with Committee Counsel to draft recommendation memos to Senator Coons on pressing legislation, vet judicial nominations, and conduct in depth legal research.

In school, I have completed my comment for the *Law Review*, in which I analyzed the Eighth Amendment implications of recent Supreme Court death penalty jurisprudence. I also prepared to compete in a First Amendment Moot Court competition in Washington, D.C. this past spring, that sadly was interrupted by the pandemic. My team's brief placed 3rd out of 26 submissions from schools across the country.

I am hoping to bring my excitement for the law, policy, writing, research, and emerging legal training to help support the critical work you do. I have a passion for justice, a tireless work ethic, and strong research, writing, and analytical skills that I am confident would make me a valuable member of your chambers. I would welcome an opportunity to interview with you.

Best,
Danny Schwaber
J.D. Candidate, Class of 2021
American University Washington College of Law
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DANIEL BENJAMIN SCHWABER | 600 H Street NE, Washington, DC | danny.schwaber@gmail.com | 202.306.6589

EDUCATION

American University Washington College of Law, Washington D.C.
Juris Doctor Candidate, Class of 2021 | GPA: 3.92 (Top 5%)
Honors: Highest Grade Designation in four courses: *Torts (Fall 2018); Legal Rhetoric: Research & Writing (Fall 2018); Legal Rhetoric: Research & Writing II (Spring 2019); Public Law (Spring 2019)*
Activities: American University Law Review*, Deputy Senior Articles Editor, Volume 70; Diversity and Inclusion Subcommittee Member*
Moot Court Honor Society, *Member*
Scholarships: Dean's Merit Scholarship; Squire Patton Boggs Public Policy Fellowship; Leonard & Meriam Melrod Endowed Scholarship

University of Michigan, Gerald R. Ford School of Public Policy, Ann Arbor, MI
Bachelor of Arts, Public Policy, May 2015; Focus: U.S. Government and Election Reform

WORK EXPERIENCE

MARYLAND OFFICE OF THE PUBLIC DEFENDER, APPELLATE DIVISION, BALTIMORE, MD
Law Clerk, June 2020 – August 2020
Drafted appellate briefs, conducted legal research, and completed daily writing assignments for the statewide Office of the Public Defender. Assisted attorneys on draft petitions and participated in weekly certiorari meetings with full division.

SENATE JUDICIARY COMMITTEE, SENATOR CHRIS COONS, WASHINGTON, D.C.
Law Clerk, August 2019 – December 2019
Drafted co-sponsorship memos, questions for congressional hearings, and background memos. Conducted legal research on questions for the Judiciary Committee. Participated in regular meetings with staff and external stakeholders.

SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, WASHINGTON, D.C.
Law Clerk, May 2019 – August 2019
Conducted legal research, drafted memos, performed document review, and assisted in oversight and investigations work by the Ranking Member within the Committee's jurisdiction. Attended briefings on relevant policy areas to assist with background memos for Committee Counsels. Participated in agency briefings and oversight strategy sessions.

LUPE VALDEZ FOR TEXAS, DALLAS, TX
Deputy Policy Director, March 2018 – August 2018
Developed policy platform, conducted regular policy training with Gubernatorial candidate, implemented debate prep program. Managed daily social media, wrote statements and press releases, policy questionnaires.

ED MEIER FOR CONGRESS, DALLAS, TX
Policy/Communications Advisor, August 2017 – March 2018
Ran day-to-day social media, created statements, drafted press releases, policy briefs, and questionnaires for congressional campaign in Texas' 32nd district. Provided overall strategic communications advice, conducted interview and debate prep, and provided policy research support for candidate and manager.

CENTER FOR AMERICAN PROGRESS, WASHINGTON, D.C.
Special Assistant, Education K-12, January 2017 – October 2017 | Intern, Health Policy, June 2012 – August 2012
Provided policy, legislative research, communications, rapid response, and operational support for think tank's education team. Content creation and partial management for @EdProgress Twitter account with over 25k followers.

CLINTON-KAINE TRANSITION PROJECT, WASHINGTON, D.C.
Staff Assistant, Co-Executive Directors, August 2016 – November 2016
Managed research, policy, writing, communications, and operational support for the Co-Executive Directors. Handled day-to-day outreach for the transition Co-Chairs, campaign leadership and the transition directors.

HILLARY FOR AMERICA, BROOKLYN, NY
Policy and Outreach Associate, September 2015 – August 2016
Assisted Director of Policy Outreach in the formation and management of 30 policy working groups engaging 1,500 policy experts. Provided Senior Policy Advisers with operations, research, rapid response, scheduling, and data support.

ADDITIONAL EXPERIENCE AND INFORMATION

Other Experience: Hillary for New Hampshire, *Summer 2015 Fellow*; Peters for Senate, MI, *2014 Intern;* Bipartisan Policy Center, Washington D.C., *Summer 2014 Democracy Project Intern;* Powell Tate, Washington, D.C., *Summer 2013 Communications Intern*; Rep. Chris Van Hollen, Washington, D.C. *Summer 2012 Congressional Intern*.

Interests: Boston sports fanatic, political polling enthusiast, aspiring banjo player, fan of policy, and bluegrass music.

Daniel Schwaber
American University, Washington College of Law
Cumulative GPA: 3.92

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts	Paul Figley	A	4	Highest Grade Designation
Contracts	Kenneth Anderson	B+	4	
Legal Rhetoric - Research & Writing I	Eric Laufgraben	A	2	Highest Grade Designation
Civil Procedure	N. Jeremi Duru	A	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Stephen Wermiel	A	4	
Criminal Law	Ira Robbins	A	3	
Legal Rhetoric - Research & Writing II	Eric Laufgraben	A	2	Highest Grade Designation
Property	Heather Hughes	A	4	
Public Law	Fernando Laguarda	A	2	Highest Grade Designation

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Supervised Externship Seminar	Michael Aniton	A	2	
Appellate Advocacy	Seth Grossman	A	3	
Criminal Procedure I	Dennis Clark	A	3	
Law Review I		P	2	
Externship Fieldwork		P	4	

Completed 20+ hour per week externship with Senate Judiciary Committee during the semester.

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	Cynthia Jones	P	4	
Election Law: American Political Process	Louis Caldera	P	3	
Legislative Negotiation	Betina Poirier	P	3	
Legal Ethics	Joseph Pileri	P	2	
Moot Court Competition		P	2	

School moved to a mandatory pass/fail grading system for Spring 2020

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Please accept this letter as the strongest possible endorsement of Daniel Schwaber's clerkship application.

Daniel is a bright student with a quick mind, natural talent, and a willingness to work hard. I have known Daniel since he was a first-year law student in my Legal Rhetoric class. Having taught in the Legal Rhetoric program for several years, I have had the opportunity to instruct many capable students, but Daniel truly stands out among them—indeed, he received the highest grade both semesters. Daniel's work product was well-organized, thoughtful, and required little editing. In addition, he is a composed and compelling oral advocate.

Daniel's success extends beyond the Legal Rhetoric program: he's at the top of his class; the American University Law Review selected him as an editor during his 1L year based on his writing and cite-checking skills alone; and the Law Review recently appointed him as an Associate Articles Editor. Daniel also had much success with the Moot Court Honor Society and is participating in a First Amendment competition this spring.

Academic accomplishments aside, Daniel is a likable person with a warm personality, and he exhibits a willingness to help his classmates. The other students and I benefitted from having Daniel in our class.

I also write this letter in my capacity as a Department of Justice senior trial counsel. I routinely supervise 1L and 2L students from the best law schools in the country, many of whom went on to become clerks for federal circuit and district court judges. Daniel compares favorably to those students.

Given his excellent written, oral, and analytic skills, sound work ethic, and warm personality, Daniel would be an asset to your chambers. I recommend him without reservation.

Please contact me if you have any questions.

Sincerely,

Eric Laufgraben

Eric Laufgraben - laufgraben@gmail.com

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Daniel Schwaber for a clerkship in your chambers. Danny previously served as a law clerk for Senator Christopher A. Coons, a member of the U.S. Senate Judiciary Committee. During his time working with the Committee, Danny demonstrated a capacity to learn quickly, an ability to think strategically, and a commitment to public service, all of which made him an asset to our office.

The jurisdiction of the Judiciary Committee encompasses a range of issues – from criminal justice to immigration to constitutional law to nominations – and Danny took on tasks across several of these areas during his clerkship. His analyses were efficiently prepared, thorough, and well-reasoned. Danny provided useful briefings on a variety of complex topics, including mandatory minimum sentences for federal and state sex crimes, judicial ethics and disclosure requirements, and proposed reforms related to naturalization and immigration detention. He reviewed the records of at least half a dozen judicial nominees, distilled the key legal issues from large volumes of information, and proposed thoughtful questions for the Senator's use in hearings and written submissions.

It also bears mention that Danny exhibited a strong ability to think strategically about the tasks at hand. I was consistently impressed with Danny's ability to identify connections between disparate issues, even ones that we had not discussed previously. His natural instinct to think beyond the assignment caused him to distinguish himself from our roster of talented clerks. This was especially notable given that Danny clerked for the Senator at the beginning of his second year of law school, while many of our clerks have two or three full years of their legal education behind them before joining our office for a clerkship.

In addition to his strong work product, Danny stood out for his dedication to public service. Danny took on this law clerk position with the Judiciary Committee for no salary, and he balanced his significant clerkship responsibilities with his coursework. We rarely accept part-time clerks, but Danny demonstrated that a highly motivated person can be successful while juggling classes and 24 hours per week in the office. At a time when many are disillusioned about the role that government can play in improving people's lives, Danny demonstrated a passion for the objectives of Senator Coons and a willingness to contribute his time and talents to the Judiciary Committee's important work.

I have no doubt that Danny would bring the same skills, insights, and commitment to a clerkship in your chambers.

Sincerely,

Erica K. Songer
Chief Counsel to Senator Christopher A. Coons

DANIEL BENJAMIN SCHWABER | 600 H Street NE, Washington, DC | danny.schwaber@gmail.com | 202.306.6589

Enclosed please find my writing sample. This bench memo is from a written assignment for my Appellate Advocacy course. We were asked to review the pending Supreme Court argument for *Kansas v. Garcia* and write a bench brief for a fictional judge including: (1) an overview of the case with factual and procedural history, (2) an analysis of the merits briefs and relevant precedent, (3) an analysis of at least two amicus briefs, (4) a recommended disposition with justification, and (5) proposed questions for oral arguments. I would be happy to provide additional samples as is helpful.

BENCH MEMORANDUM

To: Judge Grossman
From: Danny Schwaber
Re: *Kansas v. Garcia*, No. 17-834
Argument: Wednesday, October 16, 2019

Parties:

Petitioner:	STATE OF KANSAS
Counsel:	Toby Crouse, Office of the Solicitor General, State of Kansas, Topeka, KS
Respondents:	RAMIRO GARCIA, DONALDO MORALES, AND GUADALUPE OCHOA-LARA
Counsel:	Paul Hughes, McDermott Will & Emery, Washington, D.C.

Court Below:	Kan. (Brier, J.)
Decision Below:	401 P.3d 588 (Kan. 2017)

Jurisdiction: 28 U.S.C. § 1257(a)

Questions Presented on Appeal:

1. Whether 8 U.S.C. §1324a(b)(5) which prohibits the "use[]" of an I-9 work authorization form and "an information contained in or appended to [the I-9] . . . for purposes other than" specific federal enforcement action expressly preempts Kansas's prosecution of Respondents for providing false identity information on other forms, that also appeared on an I-9.

No. Respondents allege that prosecuting them for fraud, where the only benefit obtained was work, under statute which required a benefit, was expressly preempted under 8 U.S.C. § 1324a(b)(5) which prohibits using information contained on an I-9 form for purposes other than federal enforcement. While the fraudulent information was used on multiple forms, the prosecution did not rely upon anything within the I-9 system to achieve convictions.

2. Whether the Immigration Reform and Control Act impliedly preempts Kansas' prosecution of Respondents.

No. Assuming that the prosecutions were not expressly preempted, respondents contend that the prosecutions were impliedly preempted because it enters the field of work authorizations which is entirely occupied by the federal government, and because it creates a conflict that frustrates the federal objectives in controlling the work authorization process. While the benefit obtained in these cases was a job, that does not automatically make them fall within the field of work authorization and there is no conflict making it impossible to follow both the Kansas law and federal law. Further, the United States government argues that it creates no conflict at all which undermines a key aspect required for conflict preemption. Thus, the prosecution, while within a similar area, is not within the space occupied by the federal law and thus is not preempted.

Recommended Disposition: Reverse and remand.